Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6042

RONALD DALE WARDIUS,

Petitioner,

—v.—

OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

May 22, 1970—Indictment filed in Circuit Court of State of Oregon for Lane County.

June 8, 1970—Arraignment.

June 10, 1970—Plea.

September 16, 1970—Trial of Action Commenced.

September 16, 1970—Trial proceedings (29-39; 40-42).

September 16, 1970—Verdict of Court.

November 23, 1970—Sentence.

November 23, 1970—Petitioner files Notice of Appeal.

August 26, 1971—Opinion of the Oregon Court of Appeals.

September 17, 1971—Letter of Court of Appeals denying Petition for Rehearing.

November 16, 1971—Letter of Supreme Court denying Petition for Review.

May 30, 1972—Letter of United States Supreme Court granting Petition for Writ of Certiorari.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

No. 99231

THE STATE OF OREGON, PLAINTIFF

vs.

RONALD DALE WARDIUS, DEFENDANT

INDICTMENT—Filed May 22, 1970

The above named RONALD DALE WARDIUS is accused by the Lane County Grand Jury by this Indictment of the crime of ILLEGAL SALE OF NARCOTICS committed as follows:

The said RONALD DALE WARDIUS on or about the 21st day of May, 1970, in the county aforesaid, did then and there wilfully and unlawfully sell the narcotic drug marihuana to Richard J. Harp; contrary to statute and against the peace and dignity of the State of Oregon.

Dated this 22nd day of May, 1970, at Eugene, Lane County, Oregon.

* * * *

ARRAIGNMENT—Filed June 8, 1970

[Caption Omitted in Printing]

This matter coming on before Honorable Edwin E. Allen, Circuit Judge, this 8th day of June, 1970, the State of Oregon appearing by Greg Hartstrom, Deputy District Attorney for Lane County, Oregon, and the defendant Ronald Dale Wardius, appearing in person and being represented by his attorney, John Meyer, having been indicted by the Grand Jury of Lane County, Oregon, upon a charge of the crime of "ILLEGAL SALE OF NARCOTICS",

Said defendant was then arraigned by having the Indictment read to him in open Court and a true copy thereof, including all endorsements thereon handed to his attorney.

IT WAS ORDERED that said defendant enter his plea on Wednesday, June 10, 1970 at 9:00 a.m.

Dated this 8th day of June, 1970.

* * * *

PLEA—Filed June 10, 1970

[Caption Omitted in Printing]

This matter coming on before Edwin E. Allen, Circuit Judge, this 10th day of June, 1970, the State of Oregon appearing by John E. Moore, Deputy District Attorney for Lane County, Oregon, and the defendant, Ronald Dale Wardius appearing in person and being represented by his attorney, John Meyer, said defendant having been arraigned upon a charge of the crime of "ILLEGAL SALE OF NARCOTICS" and this being the time fixed for said defendant to enter his plea. Thereupon said defendant entered his oral plea of "Not Guilty" to the crime of "ILLEGAL SALE OF NARCOTICS".

Dated this 10th day of June, 1970.

* * * * *

TRIAL ENTRY—Filed September 16, 1970

[Caption Omitted in Printing]

The above entitled cause came duly on for trial before the Honorable Edward Leavy, the State of Oregon appearing by J. Patrick Horton, Deputy District Attorney for Lane County, Oregon, and the defendant, Ronald Dale Wardius, appearing in person and by his attorney, John Meyer, and the issues herein being joined and this being the time fixed for trial, and the defendant having filed his Election to Waive Jury,

Trial proceeded, and after hearing all the evidence and argument of counsel, the court, being fully advised,

find the defendant Ronald Dale Wardius, guilty of the crime charged in the Indictment. Imposition of sentence deferred and pre-sentence investigation ordered. Bail continued.

Dated this 16th day of September, 1970.

* * * *

PERTINENT PORTIONS OF THE TRIAL RECORD
Filed September 16, 1970

[Caption Omitted in Printing]

[MR. MEYER]: Q Would you state your name and address for the Court Reporter, please?
A Colleen McFadden, 3792 Stewart Road.
Q Is that in Eugene?
A Yes, it is.
Q And how old are you?
A 19.
Q Do you know the defendant seated here on my right, Ron Wardius?
A Yes, I do.
Q How long have you know [sic] him?
A For about four years.
Q Did you see him at all during the month of May or around in June of this year?
A Yes, I did.
Q And was this a business relationship or did you go out with him? Are you a relative, or just what is it?
A I was dating him at the time.
Q And were you working at that time?
A Yes, I was working at Saunders Cleaners.
Q And when did you start to work there?
A About May 13th.
Q Now, directing your attention to the night of May 21st, 1970, did you have an occasion to see Mr. Wardius?
A Yes. I went to the show with him that night.
MR. HORTON: Well now, I am going to object, Your Honor, and ask that that statement be stricken

from the record, if we are getting into an area here of alibi.

May I ask a question in aid of an objection?

THE COURT: All right.

MR. HORTON: What time was it that evening, Ma'am, that you went—you first saw the defendant?

A He came and picked me up at about 7:30 that night.

MR. HORTON: Did you see him at any time during the day?

A No, I didn't because I worked till six.

MR. HORTON: How long were you with him that evening?

A Till about 12.

MR. HORTON: We would ask that it be stricken from the record, Your Honor, and we would object under the Alibi Statute. There appears to be no—to my knowledge the record of this case appears to be no compliance with the statutory compliance of notice being given to the State in this case of an alibi.

THE COURT: So far I can't tell whether it's evidence of an alibi. So your motion to strike is denied.

Q (By Mr. Meyer) Were you with him—well, what time did you see him—that you first saw him, about?

A He came and picked me up at 7:30.

Q And where did you go?

A We went to the drive-in.

Q And what time did you go to the drive-in?

A He came and picked me up at 7:30; we got there probably about quarter to 8, or so.

Q And how long were you at the drive-in theatre?

A Till about 11:30.

Q Was Mr. Wardius there at the drive-in with you all the time?

A Yes he was.

MR. HORTON: Well, I renew my objection at this time, Your Honor, for the same grounds on the same basis.

THE COURT: I will hear you, Mr. Meyer.

MR. MEYER: If it pleases the Court, during the recess I provided counsel with the case of Johnny Wil-

liams, petitioner, versus the State of Florida, U.S. Supreme Court, October Term, 1969, decided June 22nd, 1970, and in that case—

THE COURT: What's the citation?

MR. MEYER: It's in the Criminal Law Reporter dated 6-24-70, page 3160, and I have the copy from the Judges' library, and I can provide the Court with that.

THE COURT: Three what—?

MR. MEYER: 3160.

THE COURT: All right.

MR. MEYER: And in that case the court took the Florida Alibi Statute and upheld it in this case, but they went on to say that Florida had barely—had practically the same pretrial discovery available to the defendant as under the Federal Rules of Criminal Procedure, and the case—as I read it—went on to say that this was a distinguishing situation so that we would have to—where notice of alibi it wasn't really too much to ask of the defendant, considering the fact that the defendant have [sic] broad discoveries available to him such as in the Federal courts where we have prior to trial the pre-trial conference where everything is furnished and provided practically—well, a summary of what each witness's testimony will be and a list of the witnesses and for that persuasive value it might have.

Several weeks ago this came up again—this came up in the Circuit Court here with Judge Perry, and Judge Perry allowed the alibi testimony in based upon this case and said that he at that time, based on our statute and based on this opinion, that he didn't feel that our criminal code and our statute should allow a substantive evidence that the defendant might have to be kept out due to this, and that is the reason that notice was not given. I relied somewhat upon that and my own interpretation of this case also.

THE COURT: All right. What is the citation of the Alibi Statute?

MR. MEYER: I am trying to find it here, Your Honor. I have to look it up. I can't find it.

THE COURT: It probably would be easier to find it under the Session Laws.

MR. MEYER: Yes. I know it's in the Digest of the Session Laws, the little pamphlet.

THE COURT: It should be in these codes too.

(To the Bailiff) Would you get me out of my chambers 1969 Session Laws.

MR. MEYER: It appears, Your Honor, that the replacement parts are not in these volumes. I think that's our problem.

THE COURT: It's Chapter 2, 93 Oregon Laws of '69, provides that if the defendant in a criminal action proposes to rely in any way on alibi evidence he shall, not less than 5 days before the trial of the cause, file and serve upon the District Attorney a written notice of his purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense, together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to fail and serve such notice he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good reason orders otherwise. As used in this section alibi evidence means evidence that the defendant in a criminal action was at the time of the commission of the alleged offense at a place other than the place where such offense was committed.

Now you simply say that is not a constitutional statute?

MR. MEYER: Yes, based on the U.S. Supreme Court opinion and that was my reaction, and I raised this in trial just two weeks ago, State v. Perez, and the State made the same objection, and the Court took it under consideration and agreed that our criminal code as it's matched up against Florida's and set with this opinion was such that it would not be constitutional.

THE COURT: Now, it will be the ruling of the Court that the objections be sustained.

You may want to make any kind of a showing as to why the Court should, for some good reason, allow you to offer the evidence.

MR. MEYER: Yes. I can represent to the Court that the reason that I did not follow the statute was because of Judge Perry's ruling previously, and I would be willing to so testify.

THE COURT: All right. I take that to mean that by past statute, not because of any ignorance of what the State is claiming, at the time and place of the alleged offense.

MR. MEYER: Well, we were, until yesterday, under the impression there was a motion to suppress—let me back up a little. There was a motion to suppress in a companion case; at that time it was our recollection that a witness had testified that this had happened on the 22nd. We obtained a transcript of that—well, this morning. But we asked that a tape be read back to us, I think two days ago—that would have been Monday. On that day it was said to be—that the transcript read that it was the 21st. At that time we sought this witness. We were under a different impression as to what had taken place. So I did not meet this girl until today and did not know her name until just before I called her, and the defendant sought her out and was to bring her in yesterday so I could see what her testimony would be, and I did not meet her till today. So that would be one reason that we thought we had a different day.

THE COURT: The date alleged is the 21st and—

MR. MEYER: Yes, and we thought the witness had testified the 22nd, which would have been after the crime, and that was primarily what our defense was at that time. But I had also thought of calling some alibi witnesses regarding the 22nd, which was after the crime and after the date alleged in the indictment because our recognition of the date Officer Harp testified to before was different. So we had not relied on this witness until—well, Monday when we saw what that transcript said.

THE COURT: When was the motion to suppress heard?

MR. MEYER: August 4th, and at that time I was not—during that motion to suppress we were not concerned with this date; we were concerned with a later time, and I didn't take the notes. I asked Harp—the witness Harp if he had ever seen the defendant before

at the motion to suppress and that's when the date came out, and I was not concentrating on that because I was concentrating on something else during the motion to suppress, and it was Mr. Wardius's recollection that it was the 22nd. He was absolutely sure that's what he said, and when we checked the transcript so that we could confront the witness Harp with the date, unfortunately, it said the 21st, and so what Mr. Wardius's recollection of it was incorrect. So once we realized that then he recalled that he had dated this girl this evening and I said, "Go get her".

THE COURT: All right. What's the State's position now?

MR. HORTON: Well, the State's position is this, Your Honor—are you talking about in regard to the showing of circumstances which would allow the Court for this witness to testify?

THE COURT: Yes.

MR. HORTON: All right. No. 1, the motion to suppress was held over a month ago; counsel was present at that motion to suppress; there was a Court Reporter present; he had an opportunity to examine the recording of that proceeding to determine the date in question on which the defendant and the witness confronted each other; the indictment clearly states the date of the 21st; an error on his behalf, taking notes, and no further checking on that until a short time prior to the proceedings today should not be the type of situation as defined by statute which would allow the Court to permit such testimony. He did, by his own testimony to the Court, anticipate calling alibi witnesses regardless.

There, of course, was no information given the State prior to day [sic] for those witnesses either. We don't feel he has shown sufficiently for the Court's consideration a reason why this testimony should be allowed.

THE COURT: All right. Now, Mr. Meyer, no matter what day you had an impression about, you didn't give notice that that day either.

MR. MEYER: That is correct, but for the reason that it was after the date alleged in the indictment. If it was after the the [sic] date the indictment alleged it would

be a little different type or offense. It's the 21st in the indictment and it was our recollection that it was the 22nd, and so we were—my own thinking was that if he had a date after the occurrence, that we were in a slightly different position and maybe I misunderstood the law on that issue.

THE COURT: The indictment was filed on the 22nd day of May and if he undertook to prove that this occurred sometime presumably later in the day, after the closing of the courthouse on the 22nd, that it would be—

MR. MEYER: The indictment would have been returned prior to the commission of the crime.

THE COURT: The objection—I guess it's in the form of a motion to strike?

MR. HORTON: That's correct.

THE COURT: The motion to strike is allowed.

You want to make an offer of proof?

MR. MEYER: Yes.

THE COURT: All right. You tell me when you are finished with your offer of proof. You want to call several witnesses in support of your offer of proof, or is this the only witness?

MR. MEYER: I think I would like to—well, it won't be necessary. I will end my direct examination and depending upon what the State—

THE COURT: All right. You just tell me when you are finished. Go ahead.

MR. MEYER: No further questions of this witness. Okay, now, can this witness's testimony that she has previously given be taken as the offer of proof?

THE COURT: All right, if that's what you want.

MR MEYER: Yes.

THE COURT: All right. The offer of proof is rejected. You can call your next witness. Tha's [sic] all, Ma'am.

(Tr 29-39)

"* * * * *

[MR. MEYER] Q Where were you on May 21st, at 9:05 in the evening?

[MR. WARDIUS] A I was at the Eugene Drive-In.

Q And who was there with you?
A Colleen McFadden.
MR. HORTON: I am going to object, Your Honor, and ask that both these statements and answers be stricken from the record.
THE COURT: Do you wish to be heard?
MR. MEYER: Well, if I were to follow the—of course, I have my same opinion as prior regarding the alibi statute.
THE COURT: Yes.
MR. MEYER: But in this situation I would be required to give the State five days' notice that the defendant was going to testify and I don't think I am required to do that. The situation as to whether or not the defendant will testify, of course, is entirely up to us and I may not give the State any indication as to what my defense would be as pertaining to defendant's testimony.
THE COURT: I think the statute does contemplate all of the evidence offered by the defendant by its language. It covers the evidence that is now being offered, and it will be the order of the Court that the motion to strike—that was the form of your—
MR. HORTON: That's correct.
THE COURT: —will be allowed.
MR. MEYER: And what was stricken? The last two questions about the drive-in?
THE COURT: Yes.
Q (By Mr. Meyer) Did you ever—that all.

(Tr 40-42)

* * * *

VERDICT OF THE COURT—Filed September 16, 1970

[Caption Omitted in Printing]

This matter having come on before the court, and it appearing that the defendant, Ronald Dale Wardius, at the commencement of the trial, duly waived the trial of this matter to the jury and left the trial thereof to the court, and the court having heard the testimony and examined the exhibits, is of the opinion and finds that the defendant, Ronald Dale Wardius, is guilty of the crime

of "ILLEGAL SALE OF NARCOTICS" as charged in the Indictment.

Dated this 16th day of September, 1970.

/s/ EDWARD LEAVY
Circuit Judge

* * * *

SENTENCE—Filed November 23, 1970

[Caption Omitted in Printing]

Now at this time this cause came on to be heard, the State of Oregon appearing by John B. Leahy, District Attorney for Lane County, Oregon, and the defendant, Ronald Dale Wardius, appearing in person and being represented by his attorney, John Meyer, said defendant having been duly tried and convicted of the crime of "ILLEGAL SALE OF NARCOTICS" before the court in the above entitled court and cause, and this being the time fixed for imposing sentence herein, and the court being fully advised,

IT IS HEREBY ORDERED AND ADJUDGED that said defendant, Ronald Dale Wardius, be and he hereby is sentenced to imprisonment for a term not to exceed eighteen (18) months and he is hereby committed to the legal and physical custody of the Corrections Division of the State of Oregon,

IT IS FURTHER ORDERED that the Sheriff of Lane County, Oregon deliver said defendant to the custody of the Warden of the Oregon State Penitentiary.

IT IS FURTHER ORDERED that the State have and recover judgment against the defendant for its costs and disbursements incurred herein, to be taxed, to be paid in the first instance to Lane County, Oregon.

Dated this 23rd day of November, 1970.

/s/ EDWARD LEAVY
Circuit Judge

* * * *

NOTICE OF APPEAL—Filed November 23, 1970

[Caption Omitted in Printing]

COMES NOW Defendant, Ronald Dale Wardius, by and through his attorney, John G. Meyer, and does hereby give notice to the State of Oregon, Plaintiff, and John B. Leahy, District Attorney for Lane County, Oregon, attorney for Plaintiff, that Defendant, Ronald Dale Wardius, does hereby appeal to the Court of Appeals of the State of Oregon from that certain judgment of conviction entered herein on the 23rd day of November, 1970. Defendant does appeal from the whole of said judgment of conviction.

DATED this 23rd day of November, 1970.

/s/ JOHN G. MEYER
Attorney at Law

* * * *

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

Department 2

STATE OF OREGON, RESPONDENT

v.

RONALD DALE WARDIUS, APPELLANT

OPINION—Filed August 26, 1971

FORT, J.

Defendant was convicted by the court sitting without a jury of the unlawful sale of narcotics. ORS 474.020. On appeal he challenges both the constitutionality and the application here of the alibi-notice statute (ORS 135.875), which reads as follows:

> "(1) If the defendant in a criminal action proposes to rely in any way on alibi evidence, he shall, not less than five days before the trial of the cause, file

and serve upon the district attorney a written notice of his purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to file and serve such notice, he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise.

"(2) As used in this section, 'alibi evidence' means evidence that the defendant in a criminal action was, at the time of commission of the alleged offense, at a place other than the place where such offense was committed."

At trial the defendant called as his witness one Colleen McFadden. The substance of her testimony was that on the night of the alleged sale the defendant had taken her to a movie. The court sustained a motion to strike that testimony on the ground that defendant had not filed notice of intent to rely upon an alibi as required by ORS 135.875.

Subsequently, the defendant took the stand and testified that on the night of the alleged sale, May 21, 1970, he had taken Colleen McFadden to a drive-in movie. The court again sustained a motion to strike defendant's testimony on the same ground.

The indictment here alleged the date of the crime as "on or about the 21st day of May, 1970." Counsel for defendant, in an effort to establish "good cause" why the notice required under ORS 135.875 was not given, stated the defendant erroneously recalled the state's undercover agent as testifying in a companion case tried about a month earlier that [sic] the sale took place on May 22. It was not until a day or two before the trial that defendant's counsel, who had also participated in the earlier trial, checked the transcript in the companion case and learned the witness actually testified May 21 was the date of the crime. No effort was made then to comply

with the statute or to seek a postponement of trial based thereon.

The court ruled that good cause for the failure to give the required notice was not shown, and adhered to its ruling striking the alibi evidence of both McFadden and the defendant. We think the court did not abuse its discretion in holding that "good cause" within the statute was not shown for failure to give the notice required by the statute.

Defendant asserts error in striking the proffered testimony on the ground the statute:

1) Compels him to be a witness against himself.
2) Deprives him of the right to confrontation because it does not guarantee him reciprocal discovery rights;
3) Abridges his right to testify in his own behalf; and
4) Denies him the effective benefit of his right to compulsory process to obtain witnesses in his own behalf.

We will consider these contentions in order.

Williams v. Florida, 399 US 78, 90 S Ct 1893, 90 S Ct 1914, 26 L Ed2d 446 (1970), disposes of the first point adversely to the defendant. In that case, the defendant's specific contention was that he was compelled to be a witness against himself contrary to the commands of the Fifth and Fourteenth Amendments. The court held:

> "* * * We conclude, however, as has apparently every other court that has considered the issue, that the privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses." 399 US at 83.

See also, Annotation, 30 ALR2d 480 (1953). *Accord:* Rider v. Crouse, 357 F2d 317 (10th Cir 1966); State ex rel Simons v. Burke, 41 Wis 2d 129, 163 NW2d 177 (1968); People v. Williams, 11 Mich App 62, 160 NW2d 599 (1968).

In Williams v. Florida, supra, the court stated:

> "We need not linger over the suggestion that the discovery permitted the State against petitioner in this case deprived him of 'due process' or a 'fair

trial.' Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant. Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States.[11] * * *

"[11] * * *

"We do not, of course, decide that each of these alibi-notice provisions is necessarily valid in all respects; *that conclusion must await a specific context and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the State.*" (Emphasis supplied.) 399 US at 81-82.

It is not however, necessary for us to decide that question. No witness was here called nor evidence offered by the state relating to the question of alibi. Thus, no prejudice is shown, and indeed, the defendant, on this latter score, claims none. Rider v. Crouse, supra.

Thus, we do not find it necessary to decide whether under ORS 135.875 the defendant is entitled to reciprocal discovery rights from the state, as authorized by Florida Rule of Criminal Procedure 1.200.[1] There has been no

[1] Florida Rule of Criminal Procedure 1.200 provides:

"Upon the written demand of the prosecuting attorney, specifying as particularly as is known to such prosecuting attorney, the place, date and time of the commission of the crime charged, a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon such prosecuting attorney a notice in writing of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi. Not less than five days after receipt of defendant's witness list, or such other times as the court may di-

denial thereof here. We, too, deem it appropriate, in the language of Williams v. Florida, supra, to "await a specific context" in which that issue is necessary to a decision.

Defendant next contends that since he is guaranteed the right to take the stand in his own behalf by our constitution (Oregon Constitution, Art I, § 11), he has an absolute right to do so and, in so doing, to testify himself, as well, concerning alibi as well as any other relevant matter.

Defendant confuses the right to testify with the requirement that he first comply with the notice requirement of the statute. It has been consistently held that a defendant urging insanity as a defense can, as in Oregon, be required to give notice thereof in his plea. ORS 135.870. State v. Wallace, 170 Or 60, 131 P2d 222 (1942). The legislature, by the enactment of Oregon Laws 1969, Ch 293, p 500, now ORS 135.875, saw fit only

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rect, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as are known to the prosecuting attorney) of the witnesses the State proses to offer in rebuttal to discredit the defendant's alibi at the trial of the cause. Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule. If a defendant fails to file and serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given by a defendant, the court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi if the name and address of such witness as particularly as is known to defendant or his attorney is not stated in such notice. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as herein provided, the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence. If such notice is given by the prosecuting attorney, the court may exclude the testimony of any witness offered by the prosecuting attorney for the purpose of rebutting the defense of alibi if the name and address of such witness as particularly as is known to the prosecuting attorney is not stated in such notice. For good cause shown the court may waive the requirements of this rule." Williams v. Florida, supra 399 US at 104, 105.

to require a defendant to give at least five days' notice of intent "to rely in any way on alibi evidence." The law does not deprive the defendant of his right to take the stand.

The Wisconsin Supreme Court recently considered this claim under a similar statute, and said:

> "* * * Assuming the right of a defendant under either or both state and federal constitutions to testify as a witness in his own behalf, it does not follow that such right outlaws any and all procedural requirements of conditions as to notice.
>
> "When any witness takes the stand, he swears or affirms that he will tell the truth, the whole truth and nothing but the truth. What is constitutionally protected in the right of a defendant to testify truthfully in his own behalf. An alibi is not one of several alternative defenses that can be simultaneously asserted. If what the statute terms an alibi is founded in truth and fact, the defendant was not present to commit the offense charged. If this is the situation, the defendant suffers no prejudice by the requirement of advance notice of intention to establish such fact. If we are discussing the right of a defendant to defer until the moment of his testifying the election between alternative and inconsistent alibis, we have left the concept of the trial as a search for truth far behind. Where this situation was presented to this court, we rejected the claimed right of a defendant to abandon the alibi of which he had given notice and substitute a new and different one at the time of trial. Where there is even a pretrial chance of alibi, this court has permitted cross-examination and introduction of the initial alibi notice as bearing upon an issue raised by the choice and change of mind of the defendant. These decisions, and the statute on which they are based, do not limit in any way the right of a defendant to testify truthfully in his own behalf. The condition of prior notice as to alibi testimony, like the test as to materiality and relevancy, does not invade the right of a defendant to testify in his defense."

State ex rel Simos v. Burke, supra, 41 Wis 2d at 136-38.

This assignment is without merit.

His final contention is that ORS 135.875 abridges his right to compulsory process to obtain witnesses in his own behalf. There was no such denial here. In *Simos* the Wisconsin court pointed out that the challenged statute does not disqualify any person as a prospective witness, nor does it purport to ban alibi evidence. It requires only the giving of reasonable notice of intention to do so and identification of prospective witnesses to be called in connection therewith.

In State ex rel Simos v. Burke, supra, the court well summarized:

> "From the standpoint of the constitutional rights of this defendant, we find no constitutional right infringed or invaded. From the standpoint of the public policy as determined by the legislature, we find a legitimate public interest served by the statute. From the standpoint of the reasonableness of the procedural requirement involved, we would conclude that establishing an earlier time than the trial itself for notice of alibi avoids mid-trial state motions for adjournment on the ground of surprise to permit investigation of alibi claims. The interest of the prosecution, defense and public are served by such facilitating of orderly, uninterrupted trials for the seeking of the truth and the protection of the rights of all concerned." 41 Wis 2d at 139-140.

We agree. The judgment is affirmed.

LETTER OF COURT OF APPEALS
Filed September 17, 1971

[Caption Omitted in Printing]

J. Marvin Kuhn
Deputy Public Defender
Labor & Industries Building
Salem 97310

Re: State v. Ronald Dale Wardius

Dear Mr. Kuhn:

I am directed to inform you that the court has today denied appellant's petition for rehearing in the above appeal.

Very truly yours,

/s/ JOSEPH A. GUIMOND
Deputy

JAG:bn
cc: John W. Osburn
Solicitor General
State Office Building
Salem 97310

LETTER OF SUPREME COURT—Filed November 16, 1971

[Caption Omitted in Printing]

Mr. J. Marvin Kuhn
Deputy Public Defender
Labor & Industries Building
Salem, Oregon

In Re: State of Oregon v. Wardius

Dear Mr. Kuhn:

I am directed to inform you that the Court has today denied petition for review in the above case.

Very truly yours,

/s/ JOSEPH A. GUIMOND

JAG:br
cc: Lee Johnson
Attorney General
John W. Osburn
Solicitor General
State Office Building
Salem, Oregon

SUPREME COURT OF THE UNITED STATES

No. 71-6042, October Term, 1971

RONALD DALE WARDIUS, PETITIONER

v.

OREGON

On petition for writ of Certiorari to the Court of Appeals of the State of Oregon.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

May 30, 1972

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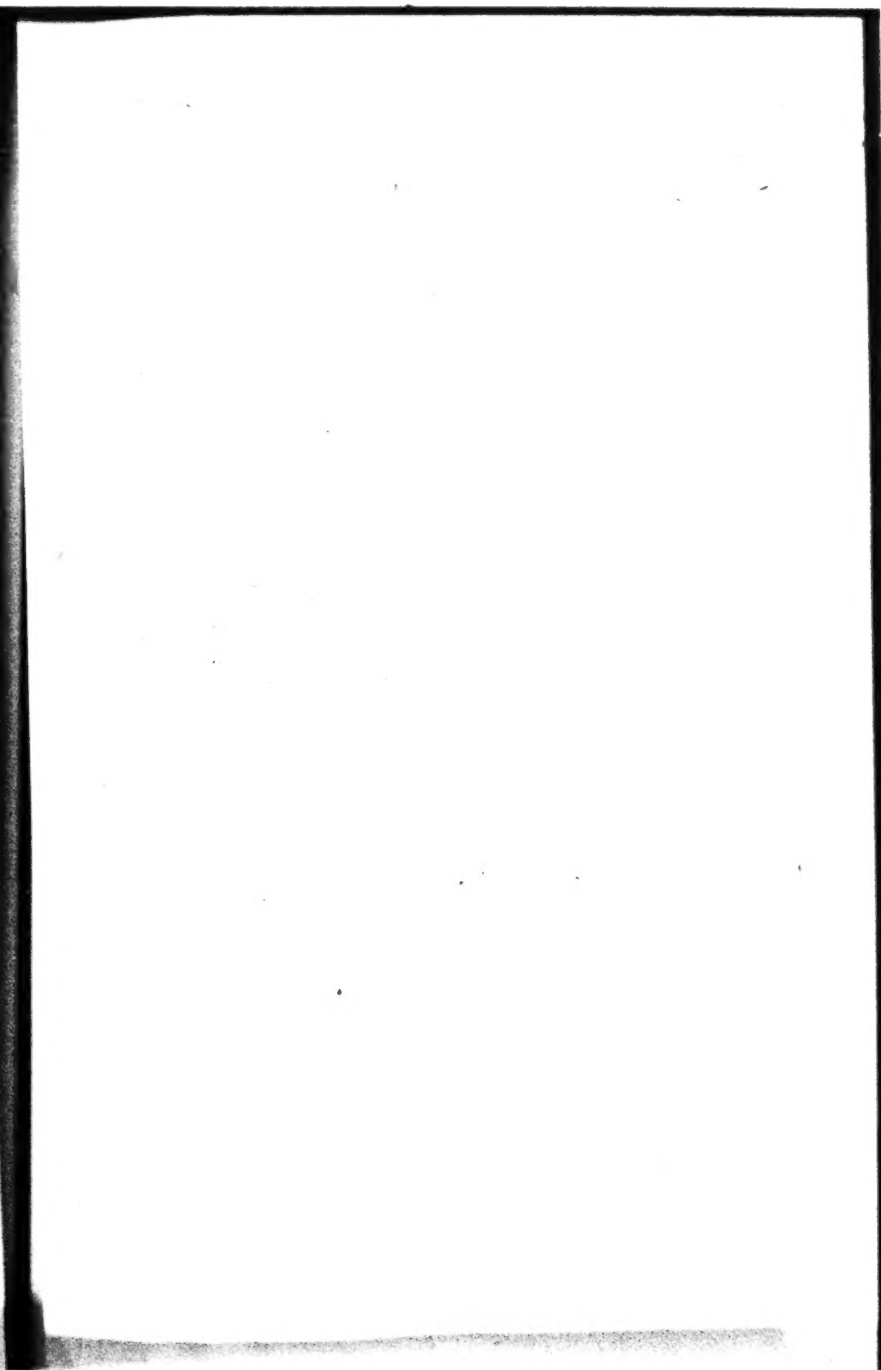

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6042

RONALD DALE WARDIUS,
Petitioner,

v.

STATE OF OREGON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF FOR PETITIONER

PETITION NOT PRINTED
RESPONSE NOT PRINTED

J. MARVIN KUHN
Deputy Public Defender
110 Labor & Industries Building
Salem, Oregon 97310

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6042

RONALD DALE WARDIUS,
Petitioner,

v.

STATE OF OREGON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF FOR PETITIONER

I. OPINION BELOW

The decision of the Court of Appeals of the State of Oregon in this case is reported at 93 Or Adv Sh 147, 487 P2d 1380 (1971), and appears in the printed appendix at page 18. There was no opinion in this case in the Supreme Court of Oregon. (See A.21).

II. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The petitioner in this case was convicted of a felony in the Circuit Court of the State of Oregon for the County of Lane. The petitioner was not permitted to introduce evidence of alibi because he had not filed a notice of intention to rely on alibi evidence as required by ORS 135.875. The contention of petitioner that ORS 135.875 violated his rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution was rejected on the merits by the Court of Appeals of the State of Oregon (A. 18), and review was denied by the Supreme Court of Oregon (A. 21). The jurisdiction of this Court over this cause is conferred by 28 U.S.C. § 1257(3).

The decision of the Supreme Court of Oregon declining to review this case was rendered on November 16, 1971. A motion for leave to proceed *in forma pauperis* and a petition for writ of certiorari were filed in this Court on January 21, 1972. Both the motion and petition were granted on May 30, 1972.

III. THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Section 135.875 of the Oregon Revised Statutes.

The Fifth Amendment provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oregon Revised Statute Section 135.875 provides:

"(1) If the defendant in a criminal action proposes to rely in any way on alibi evidence, he shall, not less than five days before the trial of the cause, file and serve upon the district attorney a written notice of his prupose to offer such evidence,

which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to file and serve such notice, he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise.

"(2) As used in this section, 'alibi evidence' means evidence that the defendant in a criminal action was, at the time of commission of the alleged offense, at a place other than the place where such offense was committed."

IV. THE QUESTIONS PRESENTED

1. Does an alibi statute requiring petitioner to furnish the state with notice of his intent to rely on alibi evidence together with the names and addresses of his prospective witnesses deny the petitioner due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution if the statute does not grant him reciprocal discovery rights against the state?

2. Has the petitioner been denied due process of law and his right not to incriminate himself if the trial court refuses to allow him to take the stand and give alibi testimony in his own defense because of his failure to file a notice of alibi as required by ORS 135.875?

3. Has petitioner been denied his right to compulsory process if the trial court refuses to allow petitioner's witnesses to give alibi testimony when petitioner failed to comply with the notice provisions of ORS 135.875?

V. STATEMENT OF THE CASE

Petitioner was arrested on June 5, 1970, for the alleged sale of marijuana to an undercover police officer (R. 13). Petitioner was subsequently tried before a judge without a jury (A. 3). Miss Colleen McFadden was called as a witness for the petitioner. She testified that she and the petitioner had been at a "drive-in" movie at the time of the crime petitioner is alleged to have committed. The prosecuting attorney for the state objected to any such testimony on the grounds that petitioner had failed to give notice of alibi testimony under ORS 135.875. The objection asked that the testimony of Miss Colleen McFadden be stricken from the consideration of the court and the objection was sustained (A. 5-7).

Petitioner then took the stand and testified that he was with Miss McFadden attending a "drive-in" movie at the time the crime was alleged to have taken place. The prosecuting attorney for the state again objected to the alibi testimony of petitioner on the grounds that petitioner had failed to comply with ORS 135.875. The court sustained the objection and petitioner's own testimony was stricken from the record (A. 10-11).

Defense counsel objected to the court's rulings to exclude the testimony of Miss FcFadden and petitioner from the consideration of the court. Petitioner was convicted of the illegal sale of narcotics (A. 11-12).

The Court of Appeals of the State of Oregon rejected petitioner's claims. The Oregon Court refused to decide whether or not ORS 135.875 denied petitioner due process of law because it failed to provide petitioner with reciprocal discovery rights against the state and held the notice of alibi statute did not deny petitioner the right to testify in his own defense; his right to compulsory

process, nor his privilege against incriminating himself (A. 13).

VI. SUMMARY OF ARGUMENT

Section 135.875 of Oregon Revised Statutes provides that an accused who intends to rely on alibi as a defense, must, within five days of trial, file with the district attorney a written notice of such intent including the place where the accused claims to have been at the time of the alleged offense together with his proposed witnesses' names and addresses. If the accused does not comply with the provisions of the statute, he is not permitted to introduce alibi evidence at his trial either through the testimony of his witnesses or himself.

Although the defendant is forced to make full disclosure of his alibi defense, the State is under no obligation to make any disclosure whatsoever to defendant. The lack of reciprocal discovery rights on the part of the defendant against the State denies defendant due process of law.

A defendant in a criminal trial has a constitutional right to take the stand and give alibi testimony in his own behalf even though he may have failed to give written notice of alibi as required by statute. A defendant has a right to be heard and he has been denied his right to due process of law if he is prevented by a procedural statute from giving alibi testimony that has direct probative value on the vital issue of his guilt or innocence.

Petitioner has been denied his right to remain silent if filing a notice of alibi pursuant to ORS 135.875 is made a condition precedent to his giving alibi testimony in his own behalf.

ORS 135.875 denies an accused his right to compulsory process for obtaining witnesses by not allowing a witness to give alibi testimony on behalf of the defendant if the defendant has failed to comply with the notice provisions of the statute. This is a direct denial of defendant's Sixth Amendment right to present a defense.

VII. ARGUMENT

A.

A NOTICE OF ALIBI STATUTE REQUIRING PETITIONER TO FURNISH THE STATE WITH NOTICE OF HIS INTENT TO RELY ON ALIBI EVIDENCE TOGETHER WITH THE NAMES AND ADDRESSES OF HIS PROSPECTIVE WITNESSES DENIES THE PETITIONER DUE PROCESS OF LAW IF THE STATUTE DOES NOT GRANT HIM RECIPROCAL DISCOVERY RIGHTS AGAINST THE STATE

This Court in *Williams v. Florida*, 299 US 78, 90 S Ct 1893, 26 L Ed2d 446 (1970), upheld Florida's notice of alibi rule as imposed by Section 1.200 of Florida's Rules of Criminal Procedure (A. 16-17).[1] However, in deciding in favor of the constitutionality of Florida's rule, this Court relied heavily on that portion of the Florida alibi statute which provided for liberal discovery by the petitioner against the State. Pursuant to the Florida rule not only was the petitioner under an obligation to disclose the names and addresses of his prospective alibi witnesses, but the State had a reciprocal duty to disclose to the petitioner the names and addresses of the witnesses the State proposed to offer in rebuttal to discredit the petitioner's alibi. The penalty imposed for failure to

[1] See Appendix to Opinion of the Court, 399 US at 104.

comply with the terms of the statute was the denial of that party's right to call witnesses in order to offer alibi evidence. The penalty, as well as the obligation to give notice rested equally on the shoulders of the State and petitioner. *Williams v. Florida*, supra at 104-105.

ORS 135.875 has no such reciprocal right of discovery in favor of the criminal defendant and this omission, petitioner submits, denies him due process of law and the right to confront the witnesses the State proposes to call against him. *Williams v. Florida*, supra; *Pointer v. Texas*, 380 US 400, 85 S Ct 1064, 13 L Ed2d 923 (1965). Under the Oregon statute, the petitioner is required to submit all his prospective alibi witnesses' names and addresses so the State may interview them, obtain their statements, and then investigate their proposed testimony hoping to find something to discredit them. Unlike the Florida rule, if the State is successful in discovering evidence to rebut the accused's alibi, it is under no obligation to disclose one shred of information to the defendant. It is plain that the obligatory disclosure requirements of ORS 135.875 are a one-way street forcing full disclosure on the part of the defendant but requiring none on the part of the State. Petitioner submits that by forcing full disclosure upon the defendant and permitting none in his behalf, this statute not only tips the scales of justice against the defendant, but practically crushes him with them. In speaking of our criminal system, Mr. Justice White in *Williams v. Florida*, supra at 399 US 82, said:

> "* * * The adversary system of trial is hardly an end to itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played * * *"

ORS 135.875 not only stacks the deck in favor of the State, but allows the State to conceal its cards until they are played, while at the same time forcing petitioner to reveal his hand. This denies petitioner due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

The Court in *Williams* was very careful in limiting its decision to those alibi statutes that provided for reciprocal discovery rights and duties when it said at 399 US 82, Footnote 11:

> "We do not, of course, decide that each of these alibi notice provisions is necessarily valid in all respects; that conclusion must await a specific context and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the State."

A criminal defendant's rights of discovery in Oregon are already so infinitesimal as to be practically meaningless, so that it is patently unfair to allow the State unfettered rights of discovery to defendant's prospective alibi witnesses while denying to defendant reciprocal discovery rights to the State's prospective rebuttal witnesses. The only right of discovery a defendant has in Oregon is the right to view a prior written statement of a State's witness for the purpose of cross examination of that witness at trial, but a defendant does not have the right to pre-trial discovery generally of the statements of the State's witnesses. *State v. Foster*, 242 Or 1, 407 P2d 901 (1965). The defendant also has access to any written statements of his in the hands of the police.[2] The alibi information obtained by the State is facilitated by the

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[2]ORS 133.750; ORS 133.755. See also State ex rel *Dooley v. Connal*, Or App , 475 P2d 582 (1970)

petitioner and not as a result of any independent discovery on the part of the State. Hence, no search for truth as to guilt or innocence, nor adequate due process is obtained when the petitioner divulges names, addresses and alibi information and does not have an equal right and opportunity to investigate the facts and persons which the State will use in rebuttal. Petitioner submits he should at least be granted reciprocal discovery privileges when it pertains to an alibi defense, particularly where, as in Oregon, the State is not bound to prove the date alleged in the indictment.[3] If the State is not bound by the date it alleges the crime occurs, it could not possibly be prejudiced in any way if the defendant were to be granted reciprocal discovery rights pertaining to their prospective rebuttal witnesses.

As pointed out by Mr. Chief Justice Burger in his concurring opinion in *Williams*, supra, at 399 US 106, a reciprocal notice of alibi rule would serve an important function by disposing of cases by means of negotiation without trial when both parties are made aware of what evidence each has pertaining to an alibi defense. The Oregon statute prevents just such a possible accomodation agreeable to both the State and the defense because the State is not required to make such disclosure to the defendant. Petitioner submits that the failure of ORS 135.875 to provide for such reciprocal discovery rights on behalf of a criminal defendant denies him due process of law.

The Oregon Court of Appeals held petitioner was not prejudiced by the failure of the statute to provide for reciprocal discovery because the state did not present evidence relating to the defense of alibi (A. 16-17). The logic of the Oregon Court escapes petitioner since the

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[3] *State v. Bowen*, Or App , 492 P2d 480 (1972)

reason no such evidence was introduced by the State was because the petitioner, in the first instance, was denied the right to put on any alibi evidence, thus dispensing with the necessity of the State to offer such rebuttal testimony. It is petitioner's belief that the reason the State had no duty to offer rebuttal alibi evidence was because petitioner was denied his constitutional right of compulsory process as well as his right to testify in his own behalf.[4] This, petitioner believes, should not prevent this Court from deciding the constitutionality of ORS 135.875.

B.

PETITIONER HAS BEEN DENIED HIS RIGHT TO TESTIFY IN HIS OWN DEFENSE AND HIS RIGHT TO REMAIN SILENT IF HE MUST FILE A NOTICE OF ALIBI AS REQUIRED BY ORS 135.875 IF THAT NOTICE IS MADE A CONDITION PRECEDENT TO HIS GIVING ALIBI TESTIMONY IN HIS OWN BEHALF.

1. **The petitioner may not constitutionally be denied the opportunity to offer evidence by his own testimony, tending to establish his innocence as a penalty for non-compliance with Oregon's notice requirement.**

Petitioner believes that a defendant in a criminal case has no more fundamental constitutional right than the right to offer evidence—and testify, if he so desires—on the issues relevant to his case. This right the State may not abridge, nor, as in Oregon, wholly deny for merely failing to comply with a procedural requirement whose benefits are, in petitioner's opinion, dubious at best.

[4] These points are discussed in Argument A, infra.

The right of an accused to be heard in his own behalf is a fundamental principle of modern jurisprudence, and this Court has held that, at a minimum, due process requires a defendant in a criminal case "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine and to offer evidence of his own." *Specht v. Patterson*, 386 US 605, 87 S Ct 1209, 18 L Ed2d 326 (1967); Cf. *Ferguson v. Georgia*, Mr. Justice Clark concurring, 365 US 570, at 601, 81 S Ct 756, 5 L Ed2d 783, at 801 (1961).

Petitioner was called to the stand to testify in his own defense as to his whereabouts at the time of the crime he was alleged to have committed. The State's prosecutor objected to any such testimony as to alibi, since petitioner had failed to comply with the statutory alibi notice requirements set forth in ORS 135.875. The objection was sustained and petitioner was denied the right to testify in his own defense (A. 11).

This Court in *Washington v. Texas*, 388 US 14, 18, 87 S Ct 1920, 18 L Ed2d 1019, 1023 (1967), speaking through former Mr. Chief Justice Warren, cited *In re Oliver*, 333 US 257, 68 S Ct 499, 92 L Ed 682 (1948), in describing

> "* * * [W]hat it regarded as the most basic ingredients of due process of law. It observed that: 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his own defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel,' 333 US, at 273, 92 L Ed at 694."

It has been and should continue to be a fundamental right in this nation to take the witness stand and be given an unalienable right to testify in one's own defense when accused of a criminal act. In the contempt case of *Hovey v. Elliott*, 167 US 409, 42 L Ed 214 (1897), this Court examined the history of the right of the defendant to be given an opportunity to be heard in his own defense as a requirement of due process of law and cited *Windsor v. McVeigh*, 93 US 277, 278, 23 L Ed 914 (1876), to the effect that:

> "The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced aginst a party *without hearing him, or giving him an opportunity to be heard*, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal," 167 US 409, at page 414 (Emphasis added).

In *Galpin v. Page*, 85 US 350, 368-9, 21 L Ed 959, 963 (1874), it was stated:

> "* * * It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard*."

Recent decisions of this Court specifically applying the various Sixth Amendment protections to State criminal proceedings add emphasis to the constitutional stature of the right to offer defensive evidence. They establish that

the accused cannot be denied the opportunity to cross-examine the witnesses against him,[5] nor may he be denied the right to compulsory process for obtaining witnesses in his own behalf. *Washington v. Texas*, supra. Similarly the defendant's right to effectively defend against the charges against him, and to offer evidence of his innocence may not be indirectly infringed by an unreasonable denial of a continuance. *Ungar v. Sarafite*, 376 US 575, 589, 84 S Ct 841, 11 L Ed2d 921 (1964).

More recently this Court held that a Tennessee statute requiring a defendant in a criminal trial to testify first or not at all violated not only the defendant's Fifth Amendment guarantee against self incrimination, but also denied him due process of law because it denied him "the guiding hand of counsel" in the timing of this critical element [the defendant's right to testify] of his defense. *Brooks v. Tennessee*, 40 USLW 4603 (U. S. June 7, 1972). The Court tacitly recognized that the right of a defendant to testify in his own behalf is constitutional in scope by saying in *Brooks*:

> "* * * While nothing we say here otherwise curtails in any way the ordinary power of a trial judge to set the order of proof, the accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand."

Petitioner believes the Oregon notice of alibi statute similarly abridges his right to testify in his own defense by making notice of alibi a condition to this right. This is as great an infringement of petitioner's right to due process as the statute condemned in *Brooks v. Tennessee*, supra.

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[5] *Pointer v. Texas*, supra; *Douglas v. Alabama*, 380 US 415, 85 S Ct 1074, 13 L Ed2d 934 (1965); *Barber v. Page*, 390 US 719 88 S Ct 1318, 20 L Ed2d 255 (1968).

It is petitioner's belief that ORS 135.875 unconstitutionally abridges petitioner of his right to testify in his own behalf as guaranteed by the Fourteenth Amendment to the United States Constitution.

In upholding the Florida notice of alibi rule in *Williams v. Florida*, 399 US 78, 90 S Ct 1893, 26 L Ed2d 446 (1970), this Court noted the statute had an exception which provided the defendant in a criminal action may testify as to alibi evidence without first complying with the statute, saying at 399 US 80:

> "* * * The threatened sanction for failure to comply is the exclusion at trial of the defendant's alibi evidence—*except for his own testimony*—* * *,"

The Oregon statute provides for no exception and the Oregon Courts excluded the testimony of petitioner on the basis of a purely procedural statute. This right should not be hampered by a procedural statute that permits material evidence to be withheld from the consideration by the judge or jury. The statute *did* deprive petitioner from giving alibi testimony in his own behalf unless he first complied with the notice provisions of the statute and it is precisely this artificial condition precedent defendant believes is unconstitutional. The right of the defendant to testify in his own behalf is also recognized

in ORS 139.310[6] and Article I, Section 11 of the Oregon Constitution[7]

The New York Code of Criminal Procedure, Section 295-1, is an alibi statute requiring the defendant, on the State's request, to furnish a bill of particulars setting forth the names and addresses of his prosepctive alibi witnesses, and in the event he fails to do so, the trial court may exclude such alibi testimony.

In interpreting the New York alibi statute, the New York Court of Appeals held the statute applicable to defendant's prospective witnesses only and did not prevent the defendant himself from testifying as to his whereabouts at the time of the alleged crime. *People v. Rakiec* et al, 289 NY 306, 45 NE2d 812 (1942). The court reasoned the purpose of the statute was to enable the state to learn something about defendant's prospective witnesses, but that was not necessary regarding the

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[6]"139.310 Defendant as witness. In the trial of or examination upon any indictment, complaint, information or other proceeding before any court, magistrate, jury or other tribunal against a person accused or charged with the commission of a crime, the person so charged or accused shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instruction of the court, or to the discrimination of the magistrate, grand jury or other tribunal before which such testimony is given. His waiver of this right creates no presumption against him. The defendant or accused, when offering his testimony as a witness in his own behalf, gives the prosecution a right to cross-examination upon all facts to which he has testified and which tend to his conviction or acquittal.

[7]Article I, "Section 11. Rights of accused in criminal prosecution. In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; * * *"

defendant himself since the state had already fingerprinted and investigated defendant prior to trial.

The New York Court also relied on the New York Code of Criminal Procedure § 393 which provided, "The defendant in *all* cases may testify as a witness in his own behalf * * *" The court in *People v. Rakiec*, supra, held:

> "* * * The section [393] is all inclusive. The enactment of section 393 in its original form (L. 1869, ch 678) was a milestone in the progress of criminal jurisprudence and its object was to benefit the accused * * *. Section 295-1 on the other hand is contained in chapter III-A entitled 'Simplified Indictments,' all of the sections of which relate to form and procedure. It is a sound rule of construction that in the absence of express language, it will be presumed that the Legislature did not intend to defeat the main purpose and object of another legislative enactment relating to the same subject * * * nor to make a radical change in long established rules * * *."

Defendant submits the same reasoning properly applies in relation to ORS 139.310 and ORS 135.875, the latter statute being applicable only to witnesses and not to defendant because the purpose of the statute is to enable the District Attorney to investigate the defendant's prospective witnesses, and not the defendant himself, since the state has presumably done that prior to trial. To construe ORS 135.875 as denying petitioner the right to testify himself as to alibi would be directly contrary to the Fourteenth Amendment due process provision of the United States Constitution, ORS 139.310, and Article I, Section 11 of the Oregon Constitution.

The Iowa Supreme Court in *State v. Post*, 255 Iowa 573, 123 NW2d 11 (1963), and *State v. Stump*, 254 Iowa

1181, 119 NW2d 210 (1963), indicated the Iowa alibi statute, Iowa Code §777.18 [8] did not prevent the defendant from testifying as to his alibi even though no notice was given as required by the statute.

Petitioner submits there is no justification for a sanction which wholly denies him the opportunity to be heard on a material issue of his defense. The alibi-notice provisions of Oregon's statute deny petitioner his right to be heard and arbitrarily stifles his defense as a penalty for what is a purely procedural omission. Such a sanction denies petitioner due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

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[8] Iowa Code 777.18 provides:

"Where the defendant pleads not guilty and proposes to show insanity as a defense, or that he relies on an alibi or that he was at some other place at the time of the alleged commission of the offense charged, he shall, at the time he pleads or at any time thereafter, not later than four days before trial, file a written notice of this purpose, setting forth the names of the witnesses, together with the address and occupation of each, and a statement of the substance of that which the defendant expects to prove by the testimony of each of said witnesses. If the defendant files said notice less than four days before the case is set for trial, the state, on motion of the country attorney, shall be entitled to a continuance of said cause for not to exceed four days."

2. A notice statute requiring a defendant to submit in writing a notice of intention to rely on alibi witnesses to the District Attorney and requiring him to provide the District Attorney with the names and addresses of his prospective witnesses compels the defendant to be a witness against himself in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

If petitioner complies with the requirements of ORS 135.875, petitioner is compelled prior to the trial not only to give notice of his intent to testify, but he must also give the place or places where petitioner claims to have been. The effect of these requirements is to compel petitioner to divulge his testimony prior to trial. The testimony so given prior to trial is a judicial statement and can be used against petitioner along with any fruits which the state discovers as a result of the compelled testimony. It is petitioner's belief that ORS 135.875 as construed by the Oregon Court of Appeals is unconstitutional as violative of the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner submits that the Oregon Court's construction of ORS 135.875 is directly opposed to the language of the Fifth Amendment in that it forces the defendant to provide the State with the names and addresses of his prospective alibi witnesses as well as the "place or places where defendant claims to have been at the time or times of the alleged offense."

Mr. Justice Brennan, speaking for the Court in *Malloy v. Hogan*, 378 US 1, 84 S Ct 1489, 12 L Ed2d 653 (1964), extended the Fifth Amendment guarantees against self incrimination to the states by way of the Fourteenth Amendment due process clause and said:

> "* * * The 14th Amendment secures against state invasion the same privilege that the 5th Amendment guarantees against federal infringement–the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, * * * for such silence," at 378 US 8.

The penalty exacted for failure to comply with the statute is the denial fo the defendant's right to present his alibi witnesses. Defendant believes this is "compulsion" which forces him to give evidence that may incriminate. Mr. Justice Douglas in announcing the opinion of the Court in *Spevack v. Klein*, 385 US 511, 87 S Ct 625, 17 L Ed2d 574 (1967), cited the above statement from *Malloy v. Hogan*, supra, and said:

> "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, 380 US 609, 85 S Ct 1229, 14 L Ed2d 106 (19650, the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' "

An accused who complies with the alibi notice requirements under ORS 135.875 is compelled to give prior testimony which might incriminate him, plus the added burden of being forced to take the stand in rebuttal if the state decides to use the information given by petitioner in the state's case in chief.

In *Williams v. Florida*, supra, this Court held:

> "* * * We conclude, however, as has apparently every other court that has considered the issue, that the privilege against self incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses," at 399 US 83.

Petitioner agrees with the above holding by this Court. Mr. Williams waa not being compelled to incriminate himself by divulging the name and address of his witness. The instant case is contra since the Oregon statute applies not only to witnesses but also to the criminal defendant. The Florida statute specifically exempts the defendant from giving notice because the defendant may testify regardless of compliance with the alibi statute (A. 17). In Oregon, the defendant is compelled prior to trial to give his testimony which he is going to rely upon as alibi during his trial, or be excluded from the stand entirely.

It is petitioner's belief that the statute, if complied with, is unconstitutional as in violation of the Fifth and Foruteenth Amendments to the United States Constitution.

C.

THE PETITIONER MAY NOT CONSTITUTIONALLY BE DENIED THE OPPORTUNITY TO OFFER WITNESSES IN HIS DEFENSE AS A SANCTION IMPOSED FOR NON-COMPLIANCE WITH A NOTICE REQUIREMENT.

An accused in a criminal trial has an absolute right to have compulsory process to obtain witnesses in his own behalf as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Washington v. Texas*, 388 US 14, 87 S Ct 1290, 18 L Ed2d 1019 (1967).

Petitioner respectfully submits that in holding he was not denied his right to compulsory process, the Oregon Court of Appeals and the Oregon Supreme Court in denying review, completely disregarded the rationale not only of *Washington v. Texas*, supra, but also of *State ex rel Gladden v. Lonergan*, 201 Or 163, 269 P2d 491

(1954), where the Oregon Supreme Court said at 201 Or 189:

> "The right to compulsory process for necessary and material witnesses on his behalf is a valuable right guaranteed to an accused. it is a right that cannot be denied by legislative act or failure to act. In the interests of justice, it is the duty of the courts to enforce the right. When all is said and done, in every criminal proceeding * * * the primary aim of the law is to arrive at the truth of the matter in controversy, and no obstacle should be sanctioned that would deny the presence of a competent witness who had knowledge of material facts."

The Oregon Supreme Court in *State v. Gann*, 254 Or 549, 463 P2d 570 (1969), reinforced the holding of *State ex rel Gladden v. Lonergan*, supra, indicating that the witnesses sought and denied to the defendant Gann could have changed the outcome of the case. Petitioner believes the holdings of *Gann* and *Lonergan* are correct statements of the law and should have been followed in his case.

This Court in *Washington v. Texas*, supra, held the right to offer the testimony of witnesses, and to compel their attendance was "in plain terms the right to present a defense" in order to enable a jury to decide the truth, and determined this was a fundamental element of due process of law. In *Washington*, the testimony sought was that of a co-defendant who was incompetent to testify favorably for his partner under the applicable Texas statutes. This Court decided that the defendant was denied his right to compulsory process because the State of Texas arbitrarily denied him the right to call a witness whose testimony would have been relevant to the defense. Former Mr. Chief Justice Warren, speaking for this Court said:

"We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been revelant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. The judgment of conviction must be reversed," at 388 US 23.

In the instant case, petitioner was denied the right to have Miss Colleen McFadden testify he was with her at a drive-in movie at the time the crime was alleged to have occurred, because he had not submitted her name and address to the state prior to trial as required by ORS 135.875. (A. 5-7). Certainly petitioner was denied his right to present his defense as arbitrarily as the defendant in *Washington v. Texas*, supra. The testimony of Miss McFadden was relevant and material to the very heart of petitioner's case; i.e., his guilt or innocence and the refusal to allow her to testify denied petitioner his right to compulsory process.

It should be noted that the accused in *Williams v. Florida*, 399 US 78, 90 S Ct 1893, 26 L Ed2d 446 (1970), was permitted to have his witnesses testify even though he failed to comply with the provisions of the Florida alibi statute. Petitioner believes this Court indicated that the rule applied in *Washington v. Texas*, supra, would be applicable had defendant in *Williams v. Florida*, supra, not been allowed to introduce the testimony of his alibi witness. This is indicated in Footnoe 14 where the Court stated:

"We emphasise that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice of alibi rule. *Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occasion to explore * * * It is enough that no such penalty was enacted here.*" (Emphasis ours)

Such a penalty was exacted on petitioner in the instant case, the effect of which was to deny him the right to present to the trial court relevant, probative evidence that could very well have proved him innocent. In short, petitioner was denied his right to present a defense which petitioner believes, contrary to the opinion of the Oregon Court of Appeals, should not be denied him on the basis of a vague public policy interest, because petitioner feels public policy could best be served by allowing a criminal defendant to present all relevant evidence that may be determinative on the issue of his guilt or innocence.

The penalty provision of ORS 135.875, denying petitioner his right to present alibi witnesses for failure to file the required notice is an "impermissible restriction" on his Sixth Amendment right to compulsory process. Cf. *Brooks v. Tennessee*, 40 USLW 4603 (U.S. June 7, 1972).

VIII. CONCLUSION

For the reasons stated, it is respectfully submitted the judgment of the court below should be reversed.

Respectfully submitted,

J. MARVIN KUHN
Deputy Public Defender
110 Labor & Industries Building
Salem, Oregon 97310

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-6042

RONALD DALE WARDIUS, *Petitioner*

VS.

STATE OF OREGON, *Respondent*

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF AMICUS CURIAE ON BEHALF OF VIRGIL JENKINS

STATEMENT AS TO INTEREST OF AMICUS CURIAE

Virgil Jenkins, on whose behalf this brief *amicus curiae* is filed, is currently serving a 50 year sentence in the state penitentiary at Lansing, Kansas, having been convicted of the crime of robbery. He filed in the District Court of Sedgewick County, Kansas a Motion to Vacate Sentence[1] on behalf of Mr. Jenkins

[1]Under Kansas procedure, a Motion to Vacate Sentence, which is filed pursuant to KANSAS GEN. STATS. ANN. § 60-1507, serves in lieu of a petition for habeas corpus as the manner by which a criminal conviction is collaterally attacked much as motions to vacate under 28 U.S.C. § 2255 serve in the federal courts.

asserting, *inter alia,* that his conviction was obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution because of the invocation at his trial of the Kansas "alibi" statute, Section 62-1341 of the Annotated Statutes of Kansas. From the denial of that motion he has appealed to the Supreme Court of Kansas. That appeal is now pending.

Amicus was charged with participation in the robbery of a Wichita motel in the early hours of the morning on July 26, 1967. He was arrested later in the morning along with two other men; items found on their persons and in the car in which they were riding strongly suggested that all or some of them were participants in the robbery.

After the conclusion of the prosecution's case-in-chief, the defense at first indicated that it was not its intention to call any witnesses. Thereafter, counsel for the defense moved to reopen the case and called defendant Virgil Jenkins to the stand. He proceeded to testify that he was in a poolhall between the hours of midnight and approximately 3:00 A.M. on the night of the robbery, and thereafter was picked up by one of the two other men found in the car at the time of his arrest. The import of this testimony, of course, was that he could not have participated in the robbery because, at the time of its commission, he was somewhere else.

At this point, the prosecutor objected and moved that the defendant's entire testimony be stricken on

the ground that it constituted an alibi, and that no notice thereof had been given as required.[2] This ob-

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[2]KANSAS GEN. STATS. ANN. § 62-1341 (1964) provides as follows:

In the trial of any criminal action in the District Court, where the complaint, indictment or information charges specifically the time and place of the offense alleged to have been committed, and the nature of the offense is such as necessitated the personal presence of the one who committed the offense, and the defendant proposes to offer evidence to the effect that he was at some other place at the time of the offense charged, he shall give notice in writing of that fact to the county attorney. The notice shall state where defendant contends he was at the time of the offense, and shall have endorsed thereon the names of witnesses which he proposes to use in support of such contention.

On due application, and for good cause shown, the court may permit defendant to endorse additional names of witnesses on such notice, using the discretion with respect thereto now applicable to allowing the county attorney to endorse names of additional witnesses on an information. The notice shall be served on the county attorney as much as seven days before the action is called for trial, and a copy thereof, with proof of such service, filed with the clerk of the court: *Provided*, On due application and for good cause shown the court may permit the notice to be served at any time before the jury is sworn to try the action.

In the event the time and place of the offense are not specifically stated in the complaint, indictment or information, on application of defendant that the time and place be definitely stated in order to enable him to offer evidence in support of a contention that he was not present, and upon due notice thereof, the Court shall direct the county attorney either to amend the complaint or information by stating the time and place of the offense as accurately as possible, or to file a bill of particulars to the indictment or information so stating the time and place of the offense, and thereafter defendant shall give the notice above provided if he proposes to offer evidence to the effect that he was at some other place at the time of the offense charged.

Unless the defendant gives the notice as above provided he shall not be permitted to offer evidence to the effect that he was at some other place at the time of the offense charged. In the event the time or place of the offense has not been specifically stated in the complaint, indictment or information, and the Court directs it be amended, or a bill of particulars filed, as above provided, and the county attorney advises the Court that he cannot safely do so on the facts as he has been informed

jection was sustained, and Mr. Jenkins' entire testimony was struck. On appeal, the Kansas Supreme Court upheld this ruling (*State v. Jenkins,* 203 Kan. 354, 454 P.2d 496 (1969), incorporating by reference the ruling in a companion case, *State v. Kelly,* 203 Kan. 360, 454 P.2d 501 (1969)).[3]

When this Court granted certiorari in *Williams v. Florida, amicus* filed a brief *amicus curiae* on the issue of whether an alibi-notice requirement is constitutional. The Court, expressly referring to that *amicus curiae* brief, reserved the very question now presented in this case:

> We emphasize that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule. Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply, by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occa-

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concerning them; or if in the progress of the trial the evidence discloses a time or place of the offense other than alleged, but within the period of the statute of limitations applicable to the offense and within the territorial jurisdiction of the Court, the action shall not abate or be discontinued for either of those reasons, but defendant may, without having given the notice above mentioned, offer evidence tending to show he was at some other place at the time of the offense.

[3]No petition for certiorari was filed from that ruling, Mr. Jenkins' counsel being of the opinion that there might be some possible question as to whether the federal question was fully raised with respect to the alibi issue in the Kansas courts. For that reason, it was decided that a Motion to Vacate Sentence should first be brought in the trial court and, if relief should be denied by the state courts, to then seek certiorari in this Court. As earlier noted, Mr. Jenkins' appeal from the denial of his Motion to Vacate is now pending in the Supreme Court of Kansas.

sion to explore. Cf. brief for *amicus curiae,* 17-26. It is enough that no such penalty was exacted here.

(399 U.S., at 83 n. 14.)

Amicus fully agrees with Petitioner Wardius as to the unconstitutionality of the severe penalty imposed by Oregon (and by Kansas) upon a defendant who, perhaps through the inadvertence of his counsel, fails to give the requisite notice. The analysis presented here differs slightly from that of Petitioner. *Amicus'* submission stresses the availability of several alternative means for enforcing a requirement of advance notice of an alibi defense which are fully sufficient to protect the interests of the prosecution and the public which do not infringe, as does the sanction imposed by Oregon, the defendant's constitutional right to be heard.

SUMMARY OF ARGUMENT

Even if the prosecution may compel the defense to give advance notice of an alibi defense, it may not foreclose him from offering evidence of his innocence—from calling witnesses and from testifying on his own behalf—as the penalty for mere non-compliance with that requirement. The prosecution's legitimate interests may be adequately protected by other, less onerous, means (such as a continuance of the trial); to deny wholly the defendant the right to prove his innocence is a blatant denial of Due Process of Law.

ARGUMENT

This case presents for decision the constitutionality of a practice by which a defendant in a criminal case forfeits his right to offer evidence of his innocence (and, in some states including Oregon and Kansas, even to testify on his own behalf) if he has for any reason failed to give notice of his intention to present an "alibi" defense at his trial.

Since this Court's decision in *Williams,* several lower courts have expressed doubts as to the constitutionality of the sanction—preclusion of the defendant's evidence—commonly imposed. *Rodriguez v. Superior Court,* 9 Cal.App.3d 493, 88 Cal.Rptr. 154 (1970); *State v. Benner,* 284 A.2d 91, 98 (Maine Sup. Jud. Ct. 1971); *Gilday v. Commonwealth,* 274 N.E.2d 589, 592 (Mass. Sup. Jud. Ct. 1971) (given the constitutional problems presented by an alibi-notice rule, until those questions definitively resolved "defendants should not be ordered to identify alibi witnesses in advance of trial"); *cf. Johns v. Perini,* 440 F.2d 577 6th Cir. 1971).[4] For the reasons which follow,

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[4]Other courts, to be sure, have been less troubled. In addition to the present case, see *State v. Nunn,* 113 N.J. Super. 161, 273 A.2d 366 (1971); *State v. Blake,* 490 P.2d 1026 (Ore.App. 1971); *Commonwealth v. Gaito,* 217 Pa. Super. 125, 268 A.2d 461 (1970). With all respect, the opinions in these cases, for the most part, wholly fail to recognize (as *Williams* clearly does, see 399 U.S., at 83 n. 14) that the issue of sanctions is wholly separate and distinct from the question which *was* resolved in *Williams* as to the permissibility of the alibi-notice requirement itself. Nor have any of these courts judged the constitutional permissibility of the sanction in the terms urged here—namely, whether there are not other equally effective remedies which do not deny the defendant the right to be heard and to offer evidence in his defense.

we think these constitutional concerns are well founded.[5]

The right to be heard in defense against criminal charges is anything but an exotic constitutional creation at the penumbra of contemporary jurisprudence. To the contrary, it is so fundamental that few would dispute its constitutional stature; a literally unbroken stream of decisions of this Court (paralleled, of course, by decisions of courts throughout this country) establish the root principle of Due Process that a defendant in a criminal case "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Specht v. Patterson,* 386 U.S. 605, 610 (1967); see also *In re Oliver,* 333 U.S. 257, 273-77 (1948) ("due process of law . . . requires that [the defendant] . . . have a reasonable opportunity to meet [the charges] by way of defense or explanation . . . and call witnesses in his behalf, either by way of defense or explanation"); *Oyler v. Boles,* 368 U.S. 448 (1962); *In re Gault,* 387 U.S. 1 (1967). The recent decisions of this Court specifically applying the various Sixth Amendment protections to State criminal proceedings establish that the accused cannot be deprived of the opportunity to cross-examine the witnesses against

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[5]Although *Amicus* agrees with Petitioner that the lack of reciprocal discovery for the benefit of the defendant also invalidates the Oregon practice, our submission here is confined to the issue of sanctions.

him[6] and, more importantly for present purposes, neither may he be denied the right to compulsory process for obtaining witnesses whose testimony might be favorable. *Washington v. Texas,* 388 U.S. 14 (1967). Similarly, the defendant's right to effectively defend against the charges against him, and to offer evidence of his innocence, may not be indirectly infringed by an unreasonable denial of a continuance. *Ungar v. Sarafite,* 376 U.S. 575, 589 (1964).

In sum, the Sixth and Fourteenth Amendments plainly assure the defendant in a criminal case (1) the right to call witnesses and present their testimony; *and* (2) the right to take the stand and to testify in his own behalf. See *Ferguson v. Georgia,* 365 U.S. 570, 598, 601 (concurring opinions).

These rights the State of Oregon denied to Petitioner Wardius, just as the State of Kansas denied *amicus* the opportunity of testifying at his own trial.[7]

We agree with Petitioner that no justification exists for the outright denial of the right to offer evidence and to testify personally on an issue which is not only relevant under the applicable law but is in fact potentially dispositive of the outcome of the case.

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[6]E.g., *Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965); *Barber v. Page,* 390 U.S. 719 (1968); *Dutton v. Evans,* 400 U.S. 74 (1970).

[7]Some states, including Florida, would not bar the defendant from testifying even though no notice was given, but would bar other witnesses. E.g., FLA.R. CRIM. PRO. 1.200; *State v. Stump,* 119 N.W. 2d 210 (Iowa Supreme Ct., 1963); *State v. Thayer,* 124 Ohio St. 1, 176 N.E. 656 (1931); *People v. Rakiec,* 260 App. Div. 452, 23 N.Y.S. 2d 607 (1940). Neither Oregon nor Kansas is so generous.

But even if one were to accept that these most fundamental rights might be weighed against some overriding, compelling state interest, no such countervailing considerations are present to justify the application of so sweeping a denial of constitutional rights for mere non-compliance with a technical requirement of notice.

The purpose which alibi statutes or rules such as the one before the Court is intended to serve—avoidance of surprise and perjurious testimony—is itself unobjectionable.[8] Most of these provisions stem from proposals made a number of years ago (see Epstein, *Advance Notice of Alibi,* 55 J. CRIM. L.C. & P.S. 29-31 (1964), at a time when the federal Constitution had not been thought to impose much restraint upon state criminal proceedings. The proponents of the alibi-notice procedure contended that the cause of justice would be well served by requiring the accused to give advance notice to the prosecution of its intention to raise an alibi defense; the prosecution might then have an adequate opportunity to investigate the facts of the defense and develop evidence of its own which might disprove it. *E.g., State v. Thayer,* supra; Millar, *The Modernization of Criminal Procedure,* J. CRIM. L. 344, 350 (1920). Some doubt has been expressed as to the necessity and efficacy of the notice requirement,[9] and barely more than a quarter of the

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[8] *Amicus* does not concede, of course, the constitutionality of the means by which the State seeks to achieve those goals by compelling the accused to give notice of alibi prior to trial.

[9] *See, e.g.,* Note, *Is Specific Notice of the Defense of Alibi Desirable?* 18 TEX.L.REV. 151 (1946).

States have adopted it;[10] further, as will be seen, not all of them routinely deny the accused his right to offer evidence of a critical defense as the penalty for noncompliance, but rather attempt to enforce that policy of disclosure by other means. See note 12, infra, and accompanying text. Finally, although the alibi-notice requirement was sustained against constitutional attack in *Williams,* two Justices thought the requirement unconstitutional. See 399 U.S., at 106-116.

We advert to these matters not so much to suggest that this Court should reconsider *Williams,* but rather because they serve to remind us that the alibi-notice procedure is not grounded on considerations of grave necessity; and that it is not a practice universally supported by persons seriously concerned with the administration of justice. These considerations are relevant, we submit, to any determination as to whether a failure to give the requisite notice could ever justify the draconian penalty of precluding the defendant's evidence. To put the matter somewhat differently, it is proper to ask whether the limited (and much debated) benefits assertedly flow-

[10]Proposals for an alibi-notice requirement have recently been made but not accepted in California (see Calif. Law Rev. Comm., RECOMMENDATION AND STUDY RELATING TO NOTICE OF ALIBI IN CRIMINAL ACTIONS (1960)) and in the federal criminal system (see Proposed Rule 12A, FED.R.CRIM.PRO., 1962 Draft, 31 F.R.D. 673 (1963)); that was the second occasion on which an alibi-notice requirement was rejected for the federal criminal system, as this Court in 1944 struck two alternate alibi provisions from the then proposed Federal Rules of Criminal Procedure. Epstein, *Advance Notice of Alibi,* 55 J. Crim. L.C. & P.S. 29, 30 (1964). See FED.R. CRIM.PRO. 12 (2d Preliminary Draft 1944).

ing from the alibi-notice requirement might adequately be secured without depriving the defendant of his constitutional right to be heard and to offer evidence tending to establish his innocence. Such an examination, we submit, convincingly demonstrates that the goal of preventing unjustifiable acquittals because of the prosecution's ability to disprove perjurious alibi defenses can adequately be protected by means far less destructive of cherished constitutional guarantees. We consider some of them briefly:

(1) The trial court might punish the wilful disregard of an applicable rule of procedure by contempt—of either the accused, his counsel, or both. Assuming that the requirement of notice is itself constitutional, neither the defendant nor his counsel should be immune from the imposition of sanctions in the manner by which courts have traditionally protected their substantial interest in orderly procedure.

(2) The trial court might, where the prosecution has been surprised by the unannounced raising of an alibi defense, continue the trial for a reasonable period to allow the prosecution to make whatever investigation might be necessary to enable it to meet the defense.[11] In at least one state,[12] the trial court is

[11]The right of speedy trial, now a constitutional protection applicable to state criminal proceedings (*Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Smith v. Hooey*, 393 U.S. 374 (1969)), would in no way be offended by a brief continuance for this purpose. The Sixth Amendment protects only against "undue and oppressive" delays (*United States v. Ewell*, 383 U.S. 116, 120 (1966)), and not against those which are justifiable and reasonable. *See, e.g., Har-*

empowered to continue the trial where an alibi defense is raised without prior notice, but does not have the power to exclude evidence of alibi. It is difficult to conceive of a situation in which the legitimate interests of the prosecution would not fully be protected by a continuance, the granting of which might even be made mandatory lest there be any doubt as to the willingness of trial judges to grant continuances in the circumstances.

(3) Should the defendant fail to give the required notice (and, again, assuming that the requirement is constitutional), that violation might be a proper basis for declaring a mistrial in circumstances (which, presumably, would be exceedingly rare) in which simply

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rison v. United States, 392 U.S. 219 (1968). Thus this Court last Term adopted for speedy trial cases "a balancing approach in which the conduct of both the prosecution and the defendant are weighed." *Barker v. Wingo*, 40 U.S.L. Week 4840, 4845 (1972). There could be no reasonable basis for complaint where the defendant's own failure to comply with the statute or rule requiring notice was the occasion for granting a continuance.

[12]See OKLA. STAT., Tit. 22, § 585 (1961). Iowa has a similar statute, but there is judicial authority allowing exclusion of the alibi evidence. See *State v. Rourick*, 245 Iowa 319, 60 N.W.2d 529 (1953). Most states, but apparently not Kansas, at the least allow the trial judge discretion to allow the evidence and protect the interests of the prosecution by other means such as continuance. See Note, 15 STAN. L. REV. 700, 701 & n. 7 (1963); *Founts v. State*, 483 P.2d 654 (Nev. Supreme Ct. 1971) (trial court's refusal to exercise discretion to allow alibi evidence despite lack of notice held reversible error); *State v. Harris*, 117 N.J. Super. 83, 283 A.2d 744 (1971). Moreover, there is some evidence that even in those states which by statute absolutely bar alibi evidence where notice should have been but was not given, trial judges ameliorate the harshness of that provision by ignoring it. See Note, *Is Specific Notice of the Defense of Alibi Desirable?* 18 TEX. L. REV. 151, 156 (1940); see Epstein, *Advance Notice of Alibi*, supra, at 36.

ordering a continuance would not be adequate to protect the legitimate interests of the prosecution.[13]

(4) The prosecutor might be allowed to argue to the jury, where the facts warrant, that the surprise assertion of an alibi defense (in violation of the requirement that he give advance notice) prejudiced the State's ability to deal with that defense and, accordingly, that the alibi defense must be viewed critically in view of the circumstances.[14] Similarly, an instruction to that effect from the trial judge might be in order.

These remedies and sanctions are fully adequate to protect the interests of the prosecution and public. Thus the American Bar Association was able to con-

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[13] While the ordering of a mistrial could in theory give rise to a claim that a retrial would constitute jeopardy in violation of the Fifth Amendment (*Benton v. Maryland*, 395 U.S. 784 (1969)); (*Price v. Georgia*, 398 U.S. 323 (1970)), such a contention would seem ill founded. See *Gori v. United States*, 367 U.S. 364 (1961). Such a case would not involve any of the factors which might render a retrial following a mistrial as a violation of the double jeopardy clause, such as a mistrial ordered because of wrongful conduct on behalf of the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." (*Gori v. United States*, supra, at 369). To the contrary, our hypothetical mistrial would be the response to the *defendant's* failure to comply with the requirement that he give advance noice of an alibi defense, in the rare case where no other remedy would suffice. *Cf. United States v. Jorn*, 400 U.S. 470, 486 ("[A]n important factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process"). Particularly when viewed as an alternative to the far harsher procedure presently practiced—exclusion of the defendant's alibi evidence altogether—such an order could not be considered a denial of due process.

[14] Such a comment would not violate the rule of *Griffin v. California*, 380 U.S. 609 (1965) assuming that the alibi-notice requirement itself violate the Fifth and Fourteenth Amendments.

clude that the sanctions for non-compliance with an alibi-notice requirement should *not* include the denial of the right to offer evidence. ABA STANDARDS OF DISCOVERY AND PROCEDURE BEFORE TRIAL, Supplement (Approved Draft, October, 1970), at pp. 5-6.

Given the settled principle that constitutional rights may not be infringed—even where the ends be legitimate—when there are available alternative means less destructive of constitutional rights (*e.g., United States v. Jackson,* 390 U.S. 570, 582-83 (1968); *United States v. Robel,* 389 U.S. 258 (1967); *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 354-56 (1951); see generally Wormuth and Mirkin, *The Doctrine of the Reasonable Alternative,* 9 UTAH L.REV. 254 (1964)), there is no possible basis for sustaining the sanction imposed upon Petitioner. The various alternatives discussed above—which may well be considerably short of exhaustive—would, singly or in combination, provide full protection for the legitimate interests of the prosecution which are said to be the basis for the alibi-notice requirement. There is, plainly and simply, no possible justification for a sanction which wholly denies the defendant all opportunity to be heard on a vital aspect of his defense. The rule which denies a defendant the right to be heard is fundamentally arbitrary, viciously choking off the defense as a penalty for what is at most a procedural omission.

The unfairness of that approach is particularly apparent when viewed against the background of the realities of criminal law administration in this coun-

try. A substantial number of defendants in criminal cases are indigent or nearly so. They may be represented by court appointed counsel, a Public Defender, or one of the attorneys whose office is the local criminal court and whose practice is operated, as the recent Presidential Crime Commission's Task Force on the Administration of Justice phrased it, on "a mass production basis." TASK FORCE REPORT: THE COURTS 32 (1967). Frequently, counsel will have had little or no opportunity to study the case much in advance of trial; it is not uncommon for client and counsel to meet just before the trial.[15] Inadvertence or the errors of counsel may account for a substantial proportion of the instances in which the required notice is not given and the alibi defense thereby lost forever; but it is the defendant, not his lawyer, who must pay the price. Thus a penalty—the loss of the right to present an alibi defense—which would be unfair even as to a defendant who deliberately concealed his intention to present an alibi defense is also indiscriminately applied to the non-wilful defendant

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[15] *See, e.g.*, Oaks and Lehman, *The Criminal Process of Cook County* and *The Indigent Defendant*, 1966, UNIV. OF ILL. L. FORUM, 584, 693 (1966); THE CHALLENGE OF CRIME IN A FREE SOCIETY, 128-29 (1967):

> In many lower courts defense counsel do not regularly appear, and counsel is either not provided to a defendant who has no funds; or, if counsel is appointed, he is not compensated. The Commission has seen, in the "bullpens" where lower court defendants often await trial, defense attorneys demanding from a potential client the loose change in his pockets or the watch on his wrist as a condition of representing him. Attorneys of this kind operate on a mass production basis, relying on pleas of guilty to dispose of their caseload. They tend to be unprepared and to make little effort to protect their clients' interests.

who, perhaps through the blunders of counsel or due to his late entry into the case, fails to give the required notice.[16]

For these reasons, we think it manifest that the total preclusion of a defendant's evidence of alibi—including his own testimony—may never be permitted, and that as a matter of law the general availability of effective means for enforcing an alibi-notice requirement confirm the unconstitutionality of such a sanction.

At the very minimum, however, no such sanction can be permitted unless (1) it appears, *on the record,* that the defendant's failure to give notice was wilful; and (2) that in the particular circumstances of the case no other means of protecting the prosecution's legitimate interests—such as a continuance or the other techniques discussed above—will suffice. The first of these requirements follows from the settled principle that constitutional rights may not be lost through inadvertence, but only through knowing, intelligent and deliberate waiver. *E.g., Fay v. Noia,* 372 U.S. 391, 439 (1963). The second requirement, of

[16]This case involves the baldest of infringements of the right of an accused to be heard and to present evidence. Recognition of the unconstitutionality of that infringement surely does not imply that a federal question would be presented by the even-handed application of traditional rules of evidence as to admissibility, any more than the application of the Sixth Amendment right of confrontation to state criminal proceedings (see authorities cited note 15, supra) has superseded state hearsay rules with a federal evidence code (*cf. United States v. Augenblick,* 393 U.S. 348, 355-56 (1969)), or the right to compulsory service of process supersedes "nonarbitrary state rules" regarding the capacity of a witness to testify. *Washington v. Texas,* 388 U.S. 14, 23 n. 21; see also *id.,* at 24-25 (Harlan, J., concurring).

course, is the narrowest conceivable application of the less-burdensome alternative principle discussed above. This is not unlike the approach taken in *North Carolina v. Pearce,* 395 U.S. 711 (1969), where the Court held that a greater sentence may not be imposed upon a defendant who had successfully appealed his original conviction and had been convicted on retrial unless "the reasons [therefor] affirmatively appear . . . [on] the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." (*Id.,* at 726). Patently, the State of Oregon has not made this showing here.

CONCLUSION

A defendant in a criminal case may not be deprived of his constitutional right to be heard and to present relevant evidence tending to establish his innocence for mere non-compliance with the notice requirement; the prosecution's legitimate interests may adequately be protected by means far less subversive of the defendant's right to offer relevant defensive evidence and to testify at his own trial. For this reason, the judgment of the court below should be reversed.

Dated: July 27, 1972.

Respectfully submitted,
JEROME B. FALK, JR.,
Attorney for Amicus Curiae,
Virgil Jenkins.

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6042

RONALD DALE WARDIUS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT

LEE JOHNSON
Attorney General of Oregon

JOHN W. OSBURN
Solicitor General

JOHN H. CLOUGH
Assistant Attorney General

W. MICHAEL GILLETTE
Assistant Attorney General
Counsel for Respondent
100 State Office Building
Salem, Oregon 97310
Phone (503) 378-4402

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In the SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1972

No. 71-6042

RONALD DALE WARDIUS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT

THE QUESTIONS PRESENTED

Respondent would supplement petitioner's statement of questions presented by adding the following threshold question:

4. On the basis of this record, has petitioner raised any substantial constitutional issue requiring review by this court?

STATEMENT OF THE CASE

Respondent excepts to that portion of petitioner's statement of the case which states, "Defense counsel objected to the court's rulings to exclude the testimony

of Miss McFadden and petitioner from the consideration of the court." Although respondent recognizes that a discussion was held at trial concerning the invocation of Oregon's alibi statute on the basis of *Williams v. Florida*, no objection to the imposition of the sanction appears on the record.

Respondent would supplement petitioner's statement of the case as follows:

Counsel for petitioner acknowledged he had not complied with the requirement of ORS 135.875 (A. 6). Pursuant to the statute, the court offered counsel an opportunity to explain his omission. Initially, counsel gave two related reasons: He viewed the statute as being unconstitutional by virtue of this Court's decision in *Williams v. Florida*, 399 US 28 (1970), and he had prevailed upon another circuit court judge to accept his view (A. 7).

The court asked if the omission of the notice was prompted by ignorance of the facts in the case (A. 8). Counsel for petitioner advised the court that on August 4, 1970, there was a hearing on a motion to suppress in a companion case at which petitioner and his trial counsel were present. During cross-examination of the state's key witness, the defense obtained the mistaken impression that the witness would testify that the sale of narcotics in the instant case occurred on May 22—the date the indictment was handed down—instead of May 21, as alleged in the indictment. Trial counsel claimed he built his plans for defense of the case around this variance in dates (A. 8-11). His plans included the calling

of alibi witnesses for May 22, although he gave no notice concerning these latter witnesses either (A. 5-10). Trial was held September 16, 1970—43 days after the hearing on the motion to suppress. Yet trial counsel failed to obtain a transcript, or to check with the court reporter to confirm that the crucial discrepancy in dates actually existed, until two days prior to trial (A. 8-9). Discovering that the testimony had referred to the 21st and not the 22nd, petitioner then allegedly first disclosed that he had been at a drive-in movie with a girl on the evening of the 21st. Trial counsel still filed no notice, this time because he did not know the girl's name (A. 8). Petitioner had known the girl for four years (A. 4). Trial counsel made no request for delay in order to comply with the alibi statute. He did not suggest or request any less serious sanction than striking the proffered testimony (A. 10-11). Neither did he make any request for expanded or reciprocal discovery rights in connection with the alibi statute, although he was aware of this Court's decision in *Williams v. Florida, supra.* Instead, he took the broad position that the statute was simply not enforceable after *Williams* (A. 7).

SUMMARY OF ARGUMENT

The facts of this case do not raise the issues pressed by petitioner, except for the abstract question of the constitutionality on its face of ORS 135.875, since petitioner, by his tactics at trial, made no effort to obtain reciprocal discovery, made no specific objection to the sanction of testimonial exclusion which the court im-

posed, and offered or requested no alternative to such sanction.

ORS 135.875 is not unconstitutional on its face by virtue of its lack of specific language offering petitioner reciprocal discovery rights against the state, even assuming the availability of such rights is constitutionally necessary, and petitioner has not been denied due process of law, absent a showing the statute has been construed to exclude such right and/or petitioner has been otherwise specifically denied such right.

ORS 135.875, in requiring petitioner to give notice of alibi as a condition precedent to giving testimony in his own behalf, does not deny petitioner either his right to testify in his own defense or his right to remain silent.

The sanction of exclusion of the testimony of petitioner and his witness under ORS 135.875 is constitutional.

ARGUMENT

A.

THE FACTS OF THE INSTANT CASE RAISE NO ISSUES REQUIRING DECISION BY THIS COURT, SINCE PETITIONER BY HIS WILLFUL TACTICS AT TIME OF TRIAL GAVE THE TRIAL COURT NO OPPORTUNITY TO TAKE APPROPRIATE CORRECTIVE ACTION WITH RESPECT TO ANY ALLEGED CONSTITUTIONAL IRREGULARITIES IN ORS 135.875.

At the time of trial, petitioner attempted to introduce

alibi evidence, both through the testimony of witness Colleen McFadden and that of petitioner himself (A. 4-11). The district attorney objected, and was sustained, on the basis of respondent's failure to comply with Oregon's notice of alibi statute, ORS 135.875 (A. 10, 11).[1]

A full inquiry into counsel's reasons for failing to supply the required notice showed that counsel was fully aware of the notice requirement, but considered the statute to be unconstitutional and unenforceable (A. 5-10). Petitioner's dilemma is thus one of his own (or at least his trial counsel's) making: By adopting the position that the Oregon alibi statute was entirely unenforceable, petitioner effectively took from the trial court any chance to modify its impact upon petitioner. By timely motion, petitioner might have raised the issues he felt were presented by the statute, including requests for reciprocal discovery rights with respect to alibi witnesses, and modification of its testimonial exclusion. He did not.[2] Failure to do so, coupled with trial counsel's failure to confirm crucial evidence prior to trial, may raise questions as to the adequacy of petitioner's representation at trial. However, the forum for the examination of such questions is not here, but in Oregon courts

[1] For the full text of ORS 135.875, see Brief for Petitioner 3-4.

[2] Both by his brief and by his petition for certiorari, petitioner asserts, "Defense counsel objected to the court's rulings to exclude the testimony of Miss McFadden and petitioner from the consideration of the court." Brief for Petitioner 5; Petition for Writ of Certiorari 5. Petitioner is mistaken; no such objection was made (A. 10-11). Neither was there any request for an alternate sanction. Under these circumstances, it is doubtful that petitioner's record should permit review of alleged constitutional imperfections. *State v. Blake*, — Or App —, 490 P2d 1026 (1971). And see *State v. Zusman*, 1 Or App 268, 460 P2d 872 (1969) Supreme Court *review denied* (1970), *cert. denied* 398 US 65 (1970).

pursuant to Oregon's Post-Conviction Relief Statutes, ORS 138.510 *et seq.*, especially ORS 138.530. See *Shipman v. Gladden,* 253 Or 191, 453 P2d 921 (1969).

The concept of fairness runs not just to criminal defendants, but to trial courts as well. It is axiomatic that a trial court should be afforded an opportunity to take "appropriate corrective action" where the possibility of error exists. See *Henry v. Mississippi,* 379 US 443, 448 (1965); *State v. Blake, supra.* Counsel did not afford the trial court such an opportunity:

1. Petitioner has made no showing that he would have been in any way prejudiced by complying with the statute.

2. Petitioner did not, either prior to or at the outset of trial, by motion or otherwise, request reciprocal discovery rights.

3. Petitioner did not, at any time, question the applicability of the statute's exclusionary rule to petitioner or to petitioner's witness, either by a motion for a continuance or through a request for, or suggestion of, any other sanction.[5]

Under these facts, it is respectfully urged that this case presents no issue not already decided in *Williams, supra.*[6] See *Henry v. Mississippi, supra,* 379 US at 448-449, 450, 451.

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[5] Neither was this issue, now treated as paramount by petitioner and *Amicus*—see argument D., *infra*—raised in a factual context which should have permitted the Oregon Court of Appeals to identify and understand it. See Brief for Appellant in court below at 20-27.

[6] See also Argument B, pp. 7-8, *infra.*

B.

ORS 135.875 IS CONSTITUTIONAL INSOFAR AS IT HAS BEEN APPLIED IN THIS CASE.

By his brief, petitioner asserts that ORS 135.875 denies petitioner due process of law if the statute does not grant him reciprocal discovery rights against the state.

Indeed, reciprocal discovery appears to be a principal concern of petitioner. However, general application of the Jencks Act, 18 USC § 3500, to state criminal prosecution is not required by the United States Constitution. See *United States v. Augenblick*, 393 US 348 (1969), where it is stated:

> "* * * But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, * * *, that the proceeding is more a spectacle (Rideau v. Louisiana, 373 US 723, 726 * * *) or trial by ordeal (Brown v. Mississippi, 297 US 278, 285 * * *) than a disciplined contest." *United States v. Augenblick, supra*, at 356.

Petitioner places heavy reliance upon a footnote in *Williams v. Florida, supra*. In *Williams*, this court upheld the constitutionality of Florida's notice of alibi rule, Florida Rules of Crim. Pro. § 1.200 (A. 16-17).[9] In so ruling, however, this court noted at 399 US 82, footnote 11:

> "We do not, of course, decide that each of these alibi notice provisions is necessarily valid in all respects; that conclusion must await a specific con-

[9] See Appendix to Opinion of the Court, 399 US at 104.

text and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the State."

As noted in Argument A, *supra*, due to the trial tactics of petitioner, the extent to which an Oregon defendant may enjoy reciprocal discovery under ORS 135.875 remains unknown. See *State v. Blake, supra*. Assuming, *arguendo*, that reciprocal discovery is necessary to enable any such alibi statute to pass constitutional muster, there is no reason to assume that an Oregon court which is asked to provide for such discovery will ignore the language contained in the *Williams* footnote. Certainly, Oregon courts should at least be given an initial opportunity to construe ORS 135.875. *Cf. Younger v. Harris*, 401 US 37 (1971).

C.

IN REQUIRING PETITIONER TO GIVE NOTICE OF ALIBI AS A CONDITION PRECEDENT TO GIVING TESTIMONY IN HIS OWN BEHALF, ORS 135.875 DOES NOT DENY PETITIONER EITHER HIS RIGHT TO TESTIFY IN HIS OWN DEFENSE OR HIS RIGHT TO REMAIN SILENT.

Petitioner next claims that ORS 135.875 compels defendant to be a witness against himself in violation of the Fifth and Fourteenth Amendments to the United States Constitution. However, this Court ruled to the contrary in *Williams v. Florida, supra*, stating:

> "We conclude, however, as has apparently every other court that has considered the issue, that the privilege against self-incrimination is not violated by

> a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses." *Ibid.*, at 83.

Petitioner attempts to distinguish *Williams* on the theory that Florida's rule exempts the defendant from giving notice because the defendant may testify regardless of whether or not he complies with the rule, whereas Oregon's statute does not (A. 17). This ignores the rationale of *William's* approval of alibi statutes as safeguarding a legitimate public interest. As this Court there noted,

> "Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate." 399 US at 81.

An eleventh-hour alibi defense is no less vexatious because the defendant plans to testify to it all by himself. See *State ex rel. Simos v. Burke*, 41 Wis2d 129, 163 NW2d 177 (1968). The state's interest in an opportunity to find witnesses to show defendant was not where he claims to have been remains. Petitioner's claimed distinction fails.

D.

THE SANCTION OF THE EXCLUSION OF TESTIMONY OF BOTH PETITIONER AND HIS WITNESS IS CONSTITUTIONAL.

The principal attack mounted by petitioner and the *Amicus* is on imposition of the exclusionary sanction. It is urged that the sanction denies petitioner his constitutional right to testify and to call witnesses. In fact, it

does neither. Instead, it enforces an entirely reasonable and appropriate procedural rule relating to the legitimate state interest alluded to by this Court in *Williams*, *i.e.*, that of safeguarding the search for truth from fabricated eleventh-hour surprise alibis.

The right to testify, and to offer witnesses, is not absolute.[6] Evidence has always been limited in admissibility. However crucial to his case it may be, a defendant may not offer hearsay testimony. The rules relating to foundation still exist: even the most crucial expert witness may not offer opinion evidence until he has been qualified as an expert.

It is in just such a posture that the alibi exclusion should be viewed: a part of the necessary foundation for such testimony is *adequate notice*. Until such notice is provided, the testimony is inadmissible.[7]

The requirement that a defendant take certain reasonable procedural steps in order to avail himself of a constitutional right is not novel. See, *e.g.*, *Brady v. Maryland*, 373 US 83, 87 (1964). (Requirement of a request as condition precedent to successful invocation

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[6] In fact, not even the right to be present at trial is absolute. See *Illinois v. Allen*, 397 US 337 (1970); *Mayberry v. Pennsylvania*, 400 US 455 (1971). So it is with respect to cross-examination. See *California v. Green*, 399 US 149 (1970).

[7] *Cf. State v. Schleigh*, 210 Or 155, 310 P2d 341 (1957), where a defendant was denied the right to put on evidence relating to mental defect where he had failed to file the prior notice required by ORS 135.870, whose exclusion provision is essentially the same as that of 135.875. The problems of notice of alibi and notice of insanity defense are, of course, closely analogous. In the cases of insanity and alibi, requiring prior notice encourages a full and fair trial. Exclusion of evidence is the practical way of effectuating the statutory purpose, absent good cause for failure to file the notice.

of a claim of improperly suppressed evidence). *Accord, Moore v. Illinois*, — US —, 40 USL Week 5071, 5073 (June 29, 1972).[9]

Petitioner and *Amicus* urge that other, less restrictive measures should be used. However, none of their proposed alternatives is satisfactory.

1. Use of contempt to punish a defendant, his counsel, or both, for willful violation of a notice requirement. This appears to presume the alibi evidence will be admitted, thereby placing the court in the position of punishing an act it intends to permit. Lost is the whole point of the notice as a device for improving the trial as a search for truth, the rationale of *Williams v. Florida, supra*, 399 US at 82.

2. Granting a continuance to give the state time to meet the alibi defense. The state has a legitimate interest in concluding cases with dispatch. *Cf. Henry v. Mississippi, supra*, 379 US at 449. Moreover, as this Court has noted,

> "[I]f so utilizing a continuance is permissible under the Fifth and Fourteenth Amendments, then surely

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[9] Indeed, the notice requirement of ORS 135.875 exerts less serious pressures on a defendant than some pressures previously sanctioned by this Court. See *e.g., California v. Byers*, 402 US 424 (1971) (statutory requirement to stop at scene of automobile accident and divulge name and address held valid); *United States v. Wade*, 388 US 218, 221-223 (1967) (defendant required to exhibit his person for observation in line-up); *Gilbert v. California*, 388 US 263 (1967) (handwriting exemplar); *Schmerber v. California*, 384 US 757 (1966) (defendant gave blood test without consent—results admissible). *Cf. Holt v. United States*, 218 US 245 (1910) (defendant required to wear a blue blouse at trial). Here, while requiring the notice, the statute neither requires that the evidence be offered not authorizes the state to anticipate—either by comment or evidence—such proof of alibi during its case in chief.

> the same result may be accomplished through pre-trial discovery, as it was here, *avoiding the necessity of a disrupted trial.*" (emphasis supplied) *Williams v. Florida, supra,* 399 US at 86.

A continuance presumes the continuing availability of the trial judge (who will have other cases to try), the prosecutor (who will have other cases to try), the jurors (extending trial increases the possibility one or more will become ill, and effectively removes all jurors from the panel of veniremen since they could not serve on any other case which may become lengthy), and witnesses (some of whom may be from out of town or out of state, and all of whom have their availability strained as the case becomes more protracted). This method would, in many cases, encourage a defendant facing a trial with serious consequences to withhold his notice until the last possible moment, thereby creating maximum confusion and a danger of a mistrial.

> "* * * Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself." *Williams v. Florida, supra,* 399 US at 85.

Accord, Commonwealth v. Vecchiolli, 208 Pa Super 483, 224 A2d 96 (1966); *State v. Cunningham,* 89 Ohio L Abs 206, 185 NE2d 327 (Ct App 1961); *Rider v. Crouse,* 357 F2d 317 (10th Cir 1966); *State v. Angeleri,* 51 NJ 382, 241 A2d 3 (1968), *cert den* 383 US 951 (1968); *State ex rel. Sikora v. Dist. Ct.,* 154 Mont 241, 462 P2d

897 (1969); *State v. Rider*, 194 Kan 398, 399 P2d 564 (1965).

3. Mistrial. This approach would constitute a "free way out" for a defendant whose very serious case was going badly: suddenly announce alibi and start over.

4. Arguing surprise to the jury. This approach would permit prosecuting counsel to testify to the jury concerning facts not in evidence, raising a whole new set of issues both with respect to the permissible scope of such comments, and the kind and scope of jury instructions required to clarify the issue.

The exclusionary sanction is both simple and fair, provided it is exacted only where a defendant had prior notice of it. Petitioner here had such notice.

CONCLUSION

For the reasons stated, it is respectfully urged that the judgment of the court below should be affirmed.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

JOHN W. OSBURN
Solicitor General

JOHN H. CLOUGH
Assistant Attorney General

W. MICHAEL GILLETTE
Assistant Attorney General
Counsel for Respondent

September, 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6042

RONALD DALE WARDIUS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

SUPPLEMENTAL BRIEF FOR RESPONDENT

LEE JOHNSON
Attorney General of Oregon

JOHN W. OSBURN
Solicitor General

JOHN H. CLOUGH
Assistant Attorney General

W. MICHAEL GILLETTE
Assistant Attorney General
Counsel for Respondent
100 State Office Building
Salem, Oregon 97310
Phone (503) 378-4402

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Pursuant to Rule 41(5) of this Court, Respondent cites as further authority the case of *State v. Kelsaw*, 95 Or Adv Sh 1589, — Or App —, 502 P2d 278 (1972). See Brief for Respondent, 7-8.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

JOHN W. OSBURN
Solicitor General

JOHN H. CLOUGH
Assistant Attorney General

W. MICHAEL GILLETTE
Assistant Attorney General
Counsel for Respondent

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WARDIUS *v.* OREGON

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 71–6042. Argued January 10, 1973—Decided June 11, 1973

At petitioner's criminal trial, a witness' alibi evidence was struck as a sanction for petitioner's failure to file a notice of alibi in accordance with Oregon's statutory requirement, and petitioner himself was not allowed to give alibi testimony. Following petitioner's conviction the appellate court, affirming, rejected his constitutional challenge to the state statute, which grants no discovery rights to criminal defendants. *Held:* Reciprocal discovery is required by fundamental fairness and it is insufficient that although the statute does not require it, the State might grant reciprocal discovery in a given case. In the absence of fair notice that petitioner will have an opportunity to discover the State's rebuttal witnesses, petitioner cannot, consistently with due process requirements, be required to reveal his alibi defense. Pp. 4–9.

6 Ore. App. 391, 487 P. 2d 1380, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., concurred in the result. DOUGLAS, J., filed an opinion concurring in the result.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–6042

Ronald Dale Wardius, Petitioner, *v.* State of Oregon. | On Writ of Certiorari to the Supreme Court of Oregon.

[June 11, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves important questions concerning the right of a defendant forced to comply with a "notice of alibi" rule to reciprocal discovery.

In *Williams* v. *Florida*, 399 U. S. 78 (1970), we upheld the constitutionality of Florida's notice of alibi rule which required criminal defendants intending to rely on an alibi defense to notify the prosecution of the place they claimed to be at the time in question and of the names and addresses of witnesses they intended to call in support of the alibi.[1] In so holding, however, we emphasized that the constitutionality of such rules might depend

[1] The requirement was attacked as a violation of the defendant's due process right to a fair trial and an invasion of his privilege against self-incriminaton. But the Court found that "[g]iven the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate." 399 U. S., at 81. Moreover, we held that "the privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses." 399 U. S., at 83.

on "whether the defendant enjoys reciprocal discovery against the State." 399 U. S., at 82 n. 11.[2]

In the case presently before us, Oregon prevented a criminal defendant from introducing any evidence to support his alibi defense as a sanction for his failure to comply with a notice of alibi rule which, on its face, made no provision for reciprocal discovery.[3] The case thus squarely presents the question left open in *Williams*, and we granted certiorari so that this question could be resolved. See 406 U. S. 957 (1972).

We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants. Since the Oregon statute did not provide

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[2] The Florida rule provided:

"Not less than five days after receipt of defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as are known to the prosecuting attorney) of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause." See 399 U. S., at 104.

[3] ORS § 135.875 provides:

"(1) If the defendant in a criminal action proposes to rely in any way on alibi evidence, he shall, not less than five days before the trial of the cause, file and serve upon the district attorney a written notice of his purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to file and serve such notice, he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise.

"(2) As used in this section, 'alibi evidence' means evidence that the defendant in a criminal action was, at the time of commission of the alleged offense, at a place other than the place where such offense was committed."

for reciprocal discovery, it was error for the court below to enforce it against petitioner, and his conviction must be reversed.[4]

I

On May 22, 1970, petitioner was indicted under O. R. S. § 474.020 for unlawful sale of narcotics. The sale allegedly occurred the previous day. At trial, after the State had concluded its case, petitioner called one Colleen McFadden who testified that on the night in question, she had been with petitioner at a drive-in movie. The prosecutor thereupon brought to the judge's attention petitioner's failure to file a notice of alibi, and after hearing argument the trial judge granted the State's motion to strike McFadden's testimony because of this failure. Petitioner himself then took the stand and attempted to testify that he was at the drive-in with McFadden at the time when the State alleged the sale occurred. Once again, however, the State objected and the trial judge again refused to permit the evidence.

Petitioner was convicted as charged and sentenced to 18 months imprisonment. On appeal, the Oregon Court of Appeals rejected petitioner's contentions that the Oregon statute was unconstitutional in the absence of reciprocal discovery rights and that the exclusion sanction abridged his right to testify in his own behalf and his right to compulsory process. See *Wardius* v. *Oregon,* 6 Ore. Ct. App. 391, 487 P. 2d 1380 (1971). In an unreported order, the Oregon Supreme Court denied petitioner's petition to review. See App. 221.

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[4] Petitioner also argues that even if Oregon's notice of alibi rule were valid, it could not be enforced by excluding either his own testimony or the testimony of supporting witnesses at trial. But in light of our holding that Oregon's rule is facially invalid, we express no view as to whether a valid rule could be so enforced. Cf. *Williams* v. *Florida, supra,* at 83, n. 14.

II

Notice of alibi rules, now in use in a large and growing number of States,[5] are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. See, *e. g.*, Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U. L. Q. 279; American Bar Ass'n. Standards Relating to Discovery and Procedure Before Trial 23–43 (1969); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149 (1960). The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. As we recognized in *Williams*, nothing in the Due Process Clause precludes States from experimenting with systems of broad discovery designed to achieve these goals. "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." 399 U. S., at 82 (footnote omitted).

But although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, but cf. *Brady* v. *Maryland*, 373 U. S. 83

[5] See *Williams* v. *Florida*, *supra*, at 82 n. 11; Note, The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense, 81 Yale L. J. 1342, n. 4.

(1963), it does speak to the balance of forces between the accused and his accuser. Cf. *In re Winship*, 397 U. S. 358, 361–364 (1970).[6] The *Williams* court was therefore careful to note that "Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant." 399 U. S., at 81 (footnote omitted). The same cannot be said of Oregon law. As the State conceded at oral argument, see transcript of oral argument, at 19, Oregon grants no discovery rights to criminal defendants, and, indeed, does not even provide defendants with bills of particulars.[7] More significantly, Oregon, unlike Florida, has no provision which requires the State to reveal the names and addresses of witnesses it plans to use to refute an alibi defense.[8]

We do not suggest that the Due Process Clause of its own force requires Oregon to adopt such provisions. Cf. *United States* v. *Augenblick*, 393 U. S. 348 (1969); *Cicenia* v. *Lagay*, 357 U. S. 504 (1958). But we do hold that in the absence of a strong showing of state interests

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[6] This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial. See, *e. g.*, *Washington* v. *Texas*, 388 U. S. 14, 22 (1967); *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963). Cf. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149, 1180–1192 (1960).

[7] As the Oregon Court of Appeals has recently pointed out, "Oregon's criminal code is almost completely lacking in pretrial discovery procedures." *State* v. *Kelsaw*, — Ore. —, 502 P. 2d 278, 280–281 (1972), cert. pending, No. 72–6012.

[8] The only discovery rights Oregon appears to permit are the right to view written statements made by the defendant and by state witnesses in the hands of the police. See *State* v. *Foster*, 242 Ore. 101, 407 P. 2d 901 (1965); ORS § 133.750; § 133.755. Cf. *State* v. *Kelsaw*, *supra*.

to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses.[9] It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

Indeed, neither the respondent nor the Oregon Court of Appeals contests these principles. Nor does the State

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[9] Indeed, the State's inherent information gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor. As one commentator has noted:

"Besides greater financial and staff resources with which to investigate and scientificially analyze evidence, the prosecutor has a number of tactical advantages. First, he begins his investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events. Only after the prosecutor has gathered sufficient evidence is the defendant informed of the charges against him; by the time the defendant or his attorney begins any investigation into the facts of the case, the trail is not only cold, but a diligent prosecutor will have removed much of the evidence from the field. In addition to the advantage of timing, the prosecutor may compel people, including the defendant, to cooperate. The defendant may be questioned within limits, and if arrested his person may be searched. He may also be compelled to participate in various nontestimonial identification procedures. The prosecutor may force third persons to cooperate through the use of grand juries and may issue subpoenas requiring appearance before prosecutorial investigatory boards. With probable cause the police may search private areas and seize evidence and may tap telephone conversations. They may use undercover agents and have access to vast amounts of information in government files. Finally, respect for government authority will cause many people to cooperate with the police or prosecutor voluntarily when they might not cooperate with the defendant." Note, Prosecutorial Discovery under Proposed Rule 16, 85 Harv. L. Rev. 994, 1018–1019 (1972) (footnotes omitted).

suggest any significant governmental interests which might support the lack of reciprocity. Instead, respondent has chosen to rest its case on a procedural point. While conceding that Oregon law fails to provide for reciprocal discovery on its face, the State contends that if petitioner had given notice of his alibi defense, the state courts might have read the Oregon statute as requiring the State to give the petitioner the names and addresses of state witnesses used to refute the alibi defense. Since petitioner failed to give notice, his alibi defense was not permitted and there were, therefore, no state rebuttal witnesses whose testimony tended to disprove the alibi. Since no such testimony was introduced, respondent argues that Oregon's willingness to permit reciprocal discovery remains untested. The State says, in effect, that petitioner should not be permitted to litigate the reciprocity issue in the abstract in federal court after bypassing an opportunity to contest the issue concretely before the state judiciary.[10]

It is, of course, true that the Oregon courts are the final arbiters of the State's own law, and we cannot predict what the state court might have done had it been faced with a defendant who had given the required notice of alibi and then sought reciprocal discovery rights. But it is this very lack of predictability which ultimately defeats the State's argument. At the time petitioner was forced to decide whether or not to reveal his alibi defense to the prosecution, he had to deal with the statute as written with no way of knowing how it might subsequently be interpreted. Nor could he retract the in-

[10] In its brief before this Court, respondent presses the related argument that petitioner failed to object to the exclusion of his alibi testimony at trial and that his conviction therefore rests on an independent state procedural ground. See Brief for Respondent, at 5 n. 2. But, as the transcript makes clear, the issue arose when the trial court sustained the State's objection to introduction of the

formation once provided should it turn out later that the hoped for reciprocal discovery rights were not granted.

For this reason, had petitioner challenged the lack of reciprocity by giving notice and then demanding discovery, he would have done so at considerable risk. To be sure, the state court might have construed the Oregon statutes so as to save the constitutionality of the notice requirement and granted reciprocal discovery rights. But the state court would also have had the option of reading state law as precluding reciprocal discovery. If the Court adopted this latter alternative, it would have had to strike down the notice of alibi requirement. But petitioner's victory would have been a Pyrrhic one, since once having given the State his alibi information, he could not retract it. Thus, under this scenario, even though the notice of alibi rule would be invalidated, the State would still have the benefit of nonreciprocal discovery rights in petitioner's case—the very result which petitioner wishes to avoid by challenging the rule.

The statute as written did not provide for reciprocal discovery, and petitioner cannot be faulted for taking the legislature at its word.[11] Indeed, even at this

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alibi testimony. Petitioner then proceeded to make an "offer of proof" in order to protect the record on appeal. Respondent cites us to no Oregon cases which would require petitioner to object to the sustaining of an objection in this context, and the state appellate court's willingness to reach the merits of petitioner's federal claims provides convincing proof that the judgment does not rest on adequate state grounds. See *Warden* v. *Hayden*, 387 U. S. 294, 297 n. 3 (1967).

[11] Nor did petitioner's attorney rest entirely on his own reading of Oregon's discovery provisions. As the attorney argued at trial, "Several weeks ago this came up again—this came up in the Circuit Court here with Judge Perry, and Judge Perry allowed the alibi testimony in based upon [*Williams* v. *Florida*] and said that he at that time, based on our statute and based on this opinion, that he

stage of the proceedings, the respondent has made no representation that the State would in fact provide reciprocal discovery rights to a defendant who complied with the notice of alibi scheme. Respondent says only that the State *might* have granted such rights.[12] But the State cannot constitutionally force compliance with its scheme on the basis of a totally unsubstantiated possibility that the statute might be read in a manner contrary to its plain language. Thus, in the absence of fair notice that he would have an opportunity to discover the State's rebuttal witnesses, petitioner cannot be compelled to reveal his alibi defense.

Since the trial court erred and since there is a substantial possibility that its error may have infected the verdict, the conviction must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

THE CHIEF JUSTICE concurs in the result.

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didn't feel that our criminal code and our statute should allow a substantive evidence [*sic*] that the defendant might have to be kept out due to this, and that is the reason that notice was not given. I relied somewhat upon that and my own interpretation of this case also." App., at 6.

[12] The State cites us to *State* v. *Kelsaw*, — Ore. —, 502 P. 2d 278 (1972), cert. pending, No. 72–6012, a recent Oregon Court of Appeals decision holding that a defendant must be given reciprocal information as to the time and place of the alleged offense before he can be required to comply with the notice of alibi rule. But merely informing the defendant of the time and place of the crime does not approach the sort of reciprocity which due process demands. Moreover, in view of the fact that *Kelsaw* was decided after petitioner's trial, it cannot be suggested that the decision gave him notice that even this limited reciprocity would be granted.

SUPREME COURT OF THE UNITED STATES

No. 71-6042

Ronald Dale Wardius, Petitioner, v. State of Oregon. } On Writ of Certiorari to the Supreme Court of Oregon.

[June 11, 1973]

MR. JUSTICE DOUGLAS, concurring in the result.

In *Williams* v. *Florida*, 399 U. S. 78, 106, I joined Mr. Justice Black in dissent from that part of the Court's decision which upheld the constitutionality of Florida's "notice of alibi" rule. We concluded that the decision was "a radical and dangerous departure from the historical and constitutionally guaranteed right of a defendant in a criminal case to remain completely silent, requiring the State to prove its case without any assistance of any kind from the defendant himself." *Id.*, at 108. One need not go far for the textual support for this position. The Fifth Amendment, written with the inquisitorial practices of the Star Chamber firmly in mind, provides that "[n]o person . . . shall be compelled to be a witness against himself." It seems difficult to quarrel with the conclusion that a "notice of alibi" provision contravenes this clear mandate, for the State would see no need for the rule unless it believed that such notice would ease its burden of proving its case or increase the efficiency of its presentation. In either case, the defendant has been compelled to aid the State in his prosecution.

The Court views the growth of "such discovery devices" as a "salutary development" because it increases the evidence available to both parties. *Ante*, at —. This development, however, has altered the balance

struck by the Constitution. The Bill of Rights does not envision an adversary proceeding between two equal parties. If that were so, we might well benefit from procedures patterned after the Rules of the Marquis of Queensberry. But, the Constitution recognized the awesome power of indictment and the virtually limitless resources of government investigators. Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution. It is not for the Court to change that balance. See *Williams* v. *Florida, supra,* at 111–114 (Black, J., dissenting).

I agree with the Court that petitioner's conviction must be reversed, but for the reasons stated by Mr. Justice Black in his dissent in *Williams.* To reverse it because of uncertainty as to the presence of reciprocal discovery is not to take the Constitution as written but to embellish it in the manner of the old masters of substantive due process.